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The Right to Vote and Access to the Ballot

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THE OPERATION AND JURISDICTION OF THE SUPREME COURT OF FLORIDA

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I. INTRODUCTION

The first comprehensive article about the operation and jurisdiction of the Supreme Court of Florida was written in 1993 and published the following year in this law review.¹ In more than ten years since, much has changed and a full revision of the earlier text is in order. For example, none of the Justices who sat on the Court in 1993 are still serving.² The change in membership alone has led to a number of significant refinements in Court protocol and analysis of its jurisdiction. Changes also appear to have been influenced by another historical fact: the ever-rising caseload of the Court. Immediately following jurisdictional reforms in 1980 that further limited the

1. Gerald Kogan & Robert Craig Waters, *The Operation & Jurisdiction of the Florida Supreme Court*, 18 NOVA L. REV. 1151 (1994).

2. The last, Justice Leander J. Shaw, Jr., retired in January 2003.

Court's jurisdiction, total court filings decreased.³ Yet by 2003, filings had risen to 2486.⁴ This rise has been accompanied by actions by the Court to increase support staff while restricting its discretionary review jurisdiction in certain categories of cases.

Another historical shift of the last decade is of great importance: the technological revolution of the 1990s—most particularly the advent of the World Wide Web⁵—has had a profound impact both on the Court's internal operations and on the way it interacts with the public and the media. At the time this article first was published, the World Wide Web was in its infancy.⁶ The original authors⁷ were only dimly aware that technology staff within the Office of the State Courts Administrator had posted a handful of pages on this medium in 1994. This made the Florida State Courts one of the first judicial bodies in the world—if not the first—to have a permanent presence on the Internet. From that single innovation, much else followed.

By 1995, the Supreme Court of Florida began greatly expanding its web presence with the addition of information dedicated solely to its own operations and procedures.⁸ In 1996, it posted its first press page,⁹ making briefs and other Court documents available instantaneously on a world wide basis. This use of the Web to distribute court documents and information was novel at the time, though soon widely imitated, and is standard practice today. This use resulted in the Court's first formal public information program,¹⁰

3. See MANNING J. DAUER & FRED GODDARD, CONSTITUTIONAL AMENDMENTS ON FLORIDA SUPREME COURT JURISDICTION, AND ON CHANGES IN TAX PROVISIONS INCLUDING HOMESTEAD EXEMPTION, TO BE CONSIDERED AT MARCH 11, 1980 ELECTION, CIVIC INFORMATION SERIES, NO. 62, PUBLIC ADMINISTRATION CLEARING SERVICE, UNIVERSITY OF FLORIDA (1980); Arthur J. England, et al., *Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform*, 32 Fla. L. Rev. 147 (1980) [hereinafter *Constitutional Jurisdiction*].

4. See, e.g. *Baker v. State*, 878 So. 2d 1236, 1245–46 (Fla. 2004), for a discussion on some aspects of the Court's increasing caseload and their effort to better conserve judicial resources.

5. The term "World-Wide Web" came into use about the time the earlier version of this article was published. Originally it meant a relatively new subset of the much older "internet," though the two terms now are virtually synonymous and will be used as such here.

6. See Robert Craig Waters, *An Internet Primer for Florida Legal Researchers*, 70 FLA. B. J., at 12, 20 (1996).

7. The original authors were Justice Gerald Kogan and Robert Craig Waters.

8. These pages have undergone several technological and stylistic renovations over the years and currently are located at <http://www.floridasupremecourt.org> (last visited Feb. 5, 2005).

9. This page subsequently was renamed the Public Information page and is located at http://www.floridasupremecourt.org/pub_info/index.shtml. (last visited Feb. 5, 2005).

10. The first version of this article suggested that the Court had no public information officer (PIO) or program, which was true at the time. See Kogan & Waters, *supra* note 1, at 1154. The first and only PIO to date, Mr. Waters, was named in 1996, and the position be-

but also led to still other innovations that, coupled with unforeseen events, would end the relative obscurity in which the Court largely operated in 1994. Some innovations were of particular importance: in September 1997 the Court began its first live, unedited television broadcasts of oral arguments, followed in October that year by its first live webcasts on the World Wide Web. That November the Court began its first live broadcasts via satellite available for downlink anywhere in North America.

The presence of this new technology and the happenstance of history later would prove potent. Perhaps the ultimate test came with the presidential election cases of 2000. For more than a month in November and December of that year, the Court's web and satellite technology gave the entire world a transparent view of its proceedings and decisions even as the Supreme Court Building was locked down, surrounded by armed security officers, and besieged by hundreds of reporters¹¹ and thousands more protesters and onlookers. Media such as the *New York Times* praised the Court's openness.¹² Though these election cases may have comprised the Court's most visible and historic appeals, they were not the first time technology played a major role in a Court-related news event. As early as 1996, the Court found itself in international headlines when its two-year-old website was defaced by hackers at a time when similar attacks on federal websites had generated enormous media interest. Some predicted this event would end judicial use of the new technology. Even at this date, many still did not understand the Web's irrepressibility.

But it was one year before the 2000 presidential elections that the Court's web presence clearly revealed its unique potency as an unfiltered information medium. In 1999, it would magnify a single Justice's dissenting opinion into a worldwide news phenomenon that some believe altered the history of Florida's death penalty law.¹³ In its 1994 version, this article began with a brief overview of routine Court operations followed by a study of

came full-time in 1998. This reflects a growing trend among major courts in the United States to have full-time public information officers.

11. Police estimates put the number of reporters at between 300 and 800 at any given time during high profile proceedings and announcements. This almost certainly is an understatement of overall numbers because many media organizations rotated reporters in and out of Tallahassee to relieve them from the twenty-four hour a day, seven days a week operation and give others experience in covering an event of such historic proportions.

12. See Linda Greenhouse, *Another Kind of Bitter Split*, N.Y. TIMES, Dec. 14, 2000, at A1.

13. Patrick Schmidt & Paul Martin, *State Supreme Courts on the World Wide Web*, 84 JUDICATURE 314, 314-15 (May/June 2001).

a high profile case.¹⁴ Ironically, it is appropriate that this article begin much the same, but this time focusing on *Provenzano v. Moore*¹⁵ and the history-making dissent that Justice Leander J. Shaw, Jr., attached to it challenging the constitutionality of the continued use of the electric chair. In the eyes of many scholars, that dissent, and its attachment of vivid photographs of the body of an electrocuted person, were the impetus behind a chain of events leading to the abolition of electrocution as the state's sole method of execution.¹⁶ The events surrounding the *Provenzano* case are an instructive example of courts operating in full and intense public view in the age of the new media and technology.

II. THE ROUTINE OPERATIONS OF THE COURT

Despite extended media coverage of a handful of high-profile cases in the last decade, the judiciary in Florida remains—as it was in 1994¹⁷—the most poorly understood branch of government. A lack of general public knowledge about the routine operation of the judiciary arises chiefly from the nature of the institution itself. With limited exceptions, judges and their employees, unlike legislative or executive officials, are ethically restricted from talking publicly about pending matters. Even the Court's Public Information Officer (PIO) has severe limitations in public comment compared to PIOs in the other branches of government or in the private sector. Official silence is imposed by constitutional constraints and by codes of ethics requiring strict impartiality and providing that judges receive information on a case only through the closely regulated process of briefing, motions, and adversarial argument.¹⁸

There are many factors contributing to the public's poor understanding of the Court. For one thing, the seven Justices and their staffs perform virtually all of their work and official duties away from public view, on the secured second floor of the Supreme Court Building in Tallahassee.¹⁹ What is

14. Kogan & Waters, *supra* note 1, at 1156–61 (studying *In re T.A.C.P.*, 609 So. 2d 588 (Fla. 1992)).

15. 744 So. 2d 413 (Fla. 1999), *cert. denied*, 528 U.S. 1182 (2000).

16. *Id.*

17. Kogan & Waters, *supra* note 1, at 1153.

18. See FLA. CODE JUD. CONDUCT, Canon 3B(7) (2004).

19. The current high-technology security barriers are a recent addition, dating only to the Fall of 1989. They were added as a result of violent attacks inside courtrooms that have occurred elsewhere in Florida and the nation, and because of threats received by some members of the Court. Prior to 1989, security was far more lax, and it was not unusual for persons to walk off the street and into a justice's office.

Kogan & Waters, *supra* note 1, at 1154, n.2.

publicly known of the Court consists largely of its more formal and ceremonial aspects: black-robed Justices seated at the bench, listening and responding to arguments by lawyers often talking in legal jargon difficult for even the participants to understand. In its decisions, the Court speaks only through formal opinions and orders normally released through the Clerk's office and Public Information Office each Thursday morning at 11 a.m. with no advance notice to the public.

Although the internal procedures of the Court are not widely known, they follow a fairly straightforward and well-defined code. Some rules have been distilled into the Florida Supreme Court's Manual of Internal Operating Procedure²⁰ and portions of the Rules of Judicial Administration,²¹ though these by no means contain all or even most of the principles and practices by which the Court operates. Some of the flavor of day-to-day Court operations can also be obtained from other works detailing the Court's history.²² The purpose of this section is not to belabor material that can be obtained elsewhere, but to review the more significant operations regulated by the Court's customary, unwritten code,²³ some aspects of which date to the Court's first sessions in 1846.

Much of the mystery behind the Court's daily operations is simply because the internal machinery is not visible to public view. Unlike the legislature with its committee system or the executive branch with its cabinet meetings and routine press briefings, the Court's meetings and research—apart from oral arguments—are kept entirely confidential until the release of an opinion or order. The most important meetings of the seven Justices occur during conferences that are closed even to the Court's own staff. Further, until 1996 the Court did not have a public information officer²⁴ and did not use its website to distribute public documents as extensively as it does today.

This lack of daily contact with the public has been an unfortunate feature, but one largely born of necessity. The Court must retain absolute neutrality and impartiality until a case is decided. The constitutional require-

20. See generally SUP. CT. MANUAL OF INTERNAL OPERATING PROCEDURE (2002), available at http://www.floridasupremecourt.org/pub_info/documents/IOPs.pdf (last visited Feb. 5, 2005) [hereinafter MANUAL OF INTERNAL OPERATING PROCEDURES].

21. See generally FLA. R. OF JUD. ADMIN.

22. E.g., Joseph A. Boyd, Jr. & Randall Reder, *A History of the Florida Supreme Court*, 35 U. MIAMI L. REV. 1019 (1981).

23. Of course, it will be necessary to reiterate a few matters addressed in Florida's Supreme Court Manual of Internal Operating Procedures in order to lay the groundwork for a discussion of the Court's unwritten procedures. The authors also note that there are some aspects of Court operations that are confidential for a variety of reasons.

24. See *supra* note 11 and accompanying text.

ment of due process²⁵ gives litigants an absolute right to have their cases reviewed in an impartial forum by neutral judges. The *Florida Code of Judicial Conduct* also requires judicial impartiality and prohibits judges and their employees from talking about pending or impending²⁶ proceedings except through established and regulated procedures including briefing, internal discussions among Court personnel, and the adversarial process.²⁷ As a general rule, no such discussion outside the confidentiality of the Court's chambers is permitted while a case is pending unless all parties to the case are given a chance to participate and respond.²⁸ There is, in sum, a strict avoidance of anything that might be seen as an *ex parte* communication involving the Court, the Justices, or Court personnel. Despite the important reasons for such security in communications, it is clear that much of the public does not generally understand the reasons for such restricted communication. For example, Court staff received thousands of e-mails and phone calls during the 2000 election appeals urging the Justices to rule a certain way or to explain comments made during arguments or in recently released opinions. Of course, these communications could not ethically be considered by the Justices and were never forwarded to them.

The procedures leading up to the release of a written opinion or order are by far the most important work of the Court. Binding precedent is often created in this decision-making process, affecting the lives of all Floridians. Citizens elsewhere in the United States can also be affected by this process. Florida is a major state—the fourth most populous in the nation—and its courts' opinions are often used for guidance in other courts throughout the nation.²⁹ The 2000 election cases demonstrated that the interpretation of Florida election laws could have a profound impact on the nation, the world, and the subsequent election reform movement.

It appears paradoxical that a state like Florida, which is so deeply committed to government in the sunshine, is required by its constitution to conduct the bulk of its judicial proceedings in secret. However, there clearly is no other way to preserve litigants' rights under the rule of due process. Unlike legislators or governors, judges cannot be required or allowed to take

25. FLA. CONST. art. I, § 9.

26. There is an important distinction between the terms pending and impending. A case is pending if it has been properly filed in a court. A case is impending if Court personnel have reason to suspect that it will eventually be filed in a court.

27. FLA. CODE JUD. CONDUCT, Canon 3B(7), (9).

28. *Id.* at Canon 3B(7).

29. *E.g.*, *Kerans v. Porter Paint Co.*, 575 N.E.2d 428, 431–32 (Ohio 1991) (adopting analysis developed in *Byrd v. Richardson-Greenshields Sec., Inc.*, 552 So. 2d 1099 (Fla. 1989)).

public stands on pending or impending matters that are yet to be resolved.³⁰ The purpose of this article is to dispel some of the mystery and lift some of the misconceptions about the Court's daily operations, including the exercise of its jurisdiction. Further, it is intended to expand and update its 1994 predecessor article, while serving the original purpose of providing information useful both to lawyers and to laypersons interested in how the Court operates.

On another level, this article will review the top level of a judicial system that has come into existence in Florida because of the various constitutional reforms that began with the adoption of the 1968 Florida Constitution and continued with the jurisdictional reforms of 1980. The authors believe that the present operations and jurisdiction of the Court are one of the success stories of Florida's efforts to modernize its governmental structure in recent decades. This article examines how that constitutional mandate is translated into the Court's daily functions.

A. *A Case Study: Provenzano v. Moore*

In an effort to dispel some of the lack of knowledge that this mandatory secrecy has created, this article will begin by reviewing the internal process by which the 1999 case of *Provenzano v. Moore*³¹ was decided. Understanding how this case was handled administratively may give a broader perspective on the Court's operations and exercise of its constitutional powers.

The case was chosen for several reasons. First, the decision is now final and thus there is no ethical impediment in discussing it to a limited extent.³² Second, the issue at stake in *Provenzano*—the constitutionality of Florida's use of the electric chair—now has been rendered moot by a statute changing the principle method of execution to lethal injection.³³ Thus, the specific issue is unlikely to come before the Court again. Lastly, the case received widespread publicity and drew great public interest around the world. As a result, *Provezano* is better known than most cases decided by the Court.

30. Despite this restriction, the Court's Public Information Office and Clerk's Office routinely receive calls asking for Justices to state their positions on issues like abortion or the death penalty when they are facing merit retention elections. Most callers are frustrated or incredulous when told the Justices cannot answer questions like these. Some controversy over this restriction on Justices has been raised by the United States Supreme Court's opinion in *Republican Party of Minn. v. White*, 536 U.S. 765 (2002).

31. 744 So. 2d 413 (Fla. 1999).

32. The authors will not interpret the legal analysis of the case, only the process by which it was shepherded through the Court. In addition, matters that fall within the secrecy of the Court will not be discussed.

33. See FLA. STAT. § 922.105(1) (2004).

On Thursday, July 8, 1999, shortly after 7 a.m., a Florida death row inmate named Allen Lee “Tiny” Davis was executed in the state’s electric chair at the state prison near Starke.³⁴ Early press accounts of the event suggested that Davis bled from his chest³⁵ during the execution, resulting in a plate-sized blood stain on his white shirt.³⁶ State officials contended that the blood was from a nosebleed exacerbated by the fact that Davis used blood-thinning medication.³⁷ Nonetheless, attorneys for a man scheduled to be executed the following day—Thomas Provenzano—immediately filed motions with the Court seeking a stay and an opportunity to raise the often litigated question of the constitutionality of the use of the electric chair.

The combination of blood appearing during the execution and the possibility of a third serious constitutional challenge to the chair in a decade caused a media sensation. Within hours, media had flooded the Court’s public information office with more public records requests than it could handle, resulting in the creation of a special webpage to distribute those documents³⁸ in a portable document format.³⁹ Until that time, most media requests for documents related to pending executions were handled in person or by facsimile machine.⁴⁰ This quickly became impossible in the *Provenzano* case as documents with a hundred or more pages were rapidly filed and dozens of media representatives sought copies before their deadlines. The Davis execution, in other words, had the effect of expanding the kinds of documents placed on the public information pages of the Court’s website, a trend that has continued since.⁴¹ Ironically, this same death-warrants website—created solely to deal with overwhelming media demand caused by the Davis execu-

34. Lesley Clark, *Controversy Erupts Over Execution*, MIAMI HERALD, July 9, 1999, at A1 [hereinafter Clark I].

35. *Id.*

36. *Id.*

37. *Id.*

38. That website remains a part of the Supreme Court public information collection and is located at http://www.floridasupremecourt.org/pub_info/deathwarrants/index.shtml. (last visited Feb. 5, 2005).

39. Usually called PDF, it has become a standard web format. Unlike other web formats, PDF documents do not lose the most important qualities of their paper originals, such as exact page breaks.

40. However, the Court began distributing briefs and opinions in cases from its website in 1996, and a more limited system of distribution using email was in use even earlier.

41. In 2000, the Court added a separate page in its “press page collection” for documents related to the discipline of judges for ethical breaches. Also in 2000, the Clerk’s office began placing nearly all merits briefs it receives in cases on its website. Later that same year all orders disposing of cases, not just opinions, were posted on the website the same day the orders were issued. In 2002, nearly all jurisdictional briefs were added to the briefs being posted. In late 2003, the docket for all cases was placed on the website.

tion—would itself become the focus of international media attention weeks later.

By the time an evidentiary hearing was held in the *Provenzano* case, the Florida Department of Corrections revealed that one of its employees had taken color photographs of Mr. Davis shortly after his execution. These were used as evidence in hearings before the trial judge, who ultimately ruled that Florida's use of the chair did not violate constitutional guarantees.⁴² Media, however, did not publish copies of the photographs even though they were public records, apparently because of their gruesome nature.⁴³ The public received only written descriptions of the photographs penned by reporters. Mr. Provenzano appealed⁴⁴ to the Court, and the photographs were part of the record. The Court expedited the case and oral argument was heard on August 24, 1999.⁴⁵

42. Sydney P. Freedberg, *Judge Upholds Electric Chair Use*, ST. PETERSBURG TIMES, Aug. 3, 1999, at 1A.

43. Their gruesomeness was much noted in the media. E.g., Sue Anne Pressley, *New Debate About an Old Killer; Foes of Electric Chair Say Florida Engages in Cruel, Unusual Punishment*, WASH. POST, Aug. 26, 1999, at A03; David Cox, *Bloody Execution Photos Viewed the High Court Saw the Presentation During Arguments Over the Future of an Orlando Killer's Trip to the Electric Chair*, ORLANDO SENTINEL, Aug. 25, 1999, at D1.

44. See FLA. CONST. art. V, § 3(b)(1)–(6). The Florida Constitution creates a distinction between the terms “appeal” and “review.” *Id.* Appeals constitute those appellate cases in which the Court must hear the case, such as cases in which the death penalty has been imposed. FLA. CONST. art. V, § 3(b)(1)–(2). Reviews are for those appellate cases in which the Court merely has discretionary jurisdiction. See FLA. CONST. art. V, § 3(b)(3)–(6). The Court traditionally has observed another standard for judicial nomenclature relevant to the distinction between appeals and reviews. For appeals, the Court either affirms or reverses the decision below; for reviews, the Court either approves or quashes the decision below. By contrast, when the Court expressly agrees or disagrees with a decision other than the one below, the Court “approves” or “disapproves” the decision. On occasion, there may be lapses in the use of this nomenclature, but the convention now is well established as a matter of Court custom.

45. This case was heard outside the regular calendar cycle. By tradition, the Court usually observes its regularly scheduled oral arguments during the first full business week of each month, with the exception of July and August when no oral argument usually occurs. However, the Chief Justice has discretion to schedule the oral argument calendar as necessary. For example, oral argument sometimes is scheduled for weeks in which Monday or Tuesday is the last day of the month. That occurred in August 1999 when Monday was August 30, so regular arguments were scheduled for that week. Special oral arguments can be scheduled at other times by the Chief Justice, a practice that especially occurs when the Court deems oral argument necessary on a pending death warrant, in some requests for advisory opinions, in cases involving pressing constitutional questions, and in other emergency matters. The Court, like most courts of last resort nationwide, traditionally observes a summer recess that usually occurs from the middle of July through the middle of August, but occasionally has been observed earlier or later. The suspension of a regular oral argument calendar in these two summer months is a traditional consequence of the summer recess.

Arguments consumed about an hour in a courtroom filled with reporters, and video of the arguments was distributed live from an electronic distribution box in the Court's press room⁴⁶ via satellite⁴⁷ and over the Internet.⁴⁸ Mr. Provenzano's attorney made the execution photographs a major feature of the arguments by holding at least one of them up for display. This argument was broadcast and photographs of it were published in newspapers, but not in any significant detail. In effect, the public still did not see the photographs. After arguments, the media held impromptu press conferences with the attorneys outside the Court, something that often follows a high-profile session.

In *Provenzano*, as with most other cases orally argued, the Court immediately held a closed-door conference. Neither the public nor the Court's own staff are allowed to attend such conferences. At conferences, the Justices tentatively voted on how the case would be decided. The official Court file was then transmitted by the Clerk's office to the office of the Justice assigned to write the majority opinion.⁴⁹

Provenzano was decided quickly because it was an expedited case involving a death warrant, a category of cases that always receives the Court's immediate attention. The normal lapse of time between oral argument and the release of an opinion in other categories of cases is usually a matter of months, and the Court attempts to render decisions within six months of oral argument or submission of the case without oral argument.⁵⁰ Occasionally, the duration can be longer in difficult cases.⁵¹ The opinion in *Provenzano*

46. The press room now is located just inside the front doors of the Florida Supreme Court Building. Broadcast journalists can hook up their recording equipment to a "mult box" that can distribute the live feed to multiple users simultaneously.

47. The satellite used at the time of this writing is AMC-3 (KU band) at 87 degrees west, transponder 18, Virtual Channel 802. The downlink frequency is 12046.750 MHz. The uplink frequency is 14348.500 MHz. The L-band frequency is 1296.750 MHz. The symbol rate is 7.32. The FEC is 3/4. The satellite may be preempted during legislative sessions and emergencies.

48. All broadcasts are managed by Florida State University's WFSU television station under state contract. These broadcasts have been a permanent service offered to the public since they began in 1997.

49. The process of opinion writing and voting on cases is discussed more fully. See discussion *infra* Part II.B.

50. FLA. R. JUD. ADMIN. 2.085(e)(2).

51. See *id.* In rare cases, the Court fractures so badly that no single Justice is able to obtain the concurrence of three other Justices in a decision, which the Florida Constitution requires for any decision to be binding. See FLA. CONST. art. V, § 3(a). Release of any opinion thus may be delayed for long periods of time while members of the Court seek a compromise. It is very rare, however, that the Court is completely unable to reach some decision in which at least four Justices agree. When that happens, the Court's precedent holds that the lower court opinion under review is automatically affirmed or approved for want of a majority

was issued on September 24, 1999, in a split decision joined by four Justices upholding the constitutionality of the electric chair,⁵² while three dissented, including Justice Shaw.⁵³

But Justice Shaw did something novel in his dissent. He attached three photographs of the prior execution of Mr. Hill, to be released as part of the opinion.⁵⁴ Because opinions are posted in their entirety on the Court's website, the photographs were also posted.⁵⁵ They also were posted on the new death warrants webpage because of the media demand for all documents in the *Provenzano* case. Initial news reports noted that Justice Shaw had taken this "unusual step."⁵⁶ None noted that the photographs were available on this new page of the Court's website collection, which of course was created solely as a vehicle for distributing court documents to the media.⁵⁷ Their placement remained unnoticed by nearly everyone until a *Miami Herald* reporter published an article on October 1, 1999, including for the first time the address of the website where the photographs could be found.⁵⁸ The story was quickly picked up by news wire services and published by media around the world.

The effect was immediate. So many people began accessing the death warrants webpage that the Court's server—its connection to the Internet—repeatedly became overtaxed and unusable.⁵⁹ Nonetheless, the public demand to view the page rose. While some found this use of the Internet con-

or, if the Court's original jurisdiction is being invoked, the relief requested is deemed to be denied. Opinions issued in the absence of a four-member majority set no precedent and do not constitute a decision for legal purposes. *See State v. Hamilton*, 574 So. 2d 124, 126 n.5 (Fla. 1991) (citing *Powell v. State*, 102 So. 652 (Fla. 1924)); *E.g., State ex rel. Albritton v. Lee*, 183 So. 782 (Fla. 1938); *Honaker v. Miles*, 171 So. 212 (Fla. 1936). Thus, the doctrine of stare decisis does not apply to such cases. There is some question whether these cases remain good law, however, in light of the present constitutional requirement that "[t]he concurrence of four Justices shall be necessary to a decision." FLA. CONST. art. V, § 3(a).

52. *Provenzano v. Moore*, 744 So. 2d 413, 416 (Fla. 1999).

53. *Id.* at 422–51.

54. *Id.* at 442–44. The version in *Southern Reporter*, *Second* series is reproduced in black and white. Justice Shaw used color photographs.

55. The entire opinion—including the photographs—remained on the Court's website.

56. Steve Bosquet, *Electric Chair Staying on the Job*, MIAMI HERALD, Sept. 25, 1999, at 1A.

57. *E.g.*, Sydney P. Freedberg, *Court Upholds Use of Electric Chair Series: The Electric Chair*, ST. PETERSBURG TIMES, Sept. 25, 1999, at 1A.

58. Lesley Clark, *Execution Photos, Racist Tape On-line*, MIAMI HERALD, Oct. 1, 1999, at 1B. The reference to a "racist tape" was for an audio file posted on the Florida Department of Law Enforcement's website in the hope someone would recognize the voice of a man being sought for a bombing at Florida A&M University. *Id.*

59. Lesley Clark, *Death Photos Attract Crowds*, MIAMI HERALD, Oct. 6, 1999, at 1B.

troversial,⁶⁰ the reaction of the general public in e-mails and web chat room discussions in the United States seemed to approve of both the death penalty and posting the photographs on the Internet as a deterrent.⁶¹ The discussion among the lay public, in other words, came to regard the death warrants web-site as a news phenomenon in itself. Many people made their own assumptions about why the photographs were on-line. Few seemed to grasp the true reason why the page had been created, and few expected it to alter the legal status of the death penalty in Florida.⁶² Whether it did can only be a matter of speculation.

Nonetheless, without stating a reason, the United States Supreme Court accepted certiorari jurisdiction in the *Provenzano* case on October 26, 1999. This appeared to surprise some state lawmakers, who immediately suggested a special legislative session.⁶³ A session was convened in early January 2000 and legislation was passed providing that the death penalty be administered by lethal injection unless the inmate opts for electrocution. Following this change, the United States Supreme Court dismissed the case. Whatever action the Court might have taken thus cannot be known.

Some have suggested that Justice Shaw's actions in the *Provenzano* case created a climate that led to the reform.⁶⁴ However, the only thing that can be said with certainty is that his publication of the execution photographs marked the point in time at which courts and court watchers vividly realized, perhaps to their surprise, that the World-Wide Web is a powerful medium, and the information it provides reaches people unsummarized, unfiltered, and undelayed.

This experience contributed to the Court's subsequent approach to the most high profile cases it has recently considered—those associated with the 2000 presidential elections a year later. Thus, the two key ingredients for communicating to a watching world-web distribution of documents, and broadcasts of arguments—already were in place and had been tested by real events before the elections of 2000. Even the separate webpage created to

60. David Rovella, *Electrocution's Face on Display*, 22 NAT'L L.J., Nov. 8, 1999, at A4.

61. Jackie Hallifax, *Bloody Execution Photos Make Florida Court's Web Site Popular World Wide*, NAPLES DAILY NEWS, Oct. 29, 1999, available at <http://web.naplesnews.com/today/florida/d3751949.htm>.

62. Steve Bousquet, *Florida Faces Legal Crisis over the Chair*, MIAMI HERALD, Oct. 28, 1999, at 1A (noting that the later decision of the United States Supreme Court to accept certiorari jurisdiction in *Provenzano* was "unexpected.").

63. Marcia Gelbart & Jenny Staletoich, *High Court Has State Asking: How Do We Keep killing?*, PALM BEACH POST, Oct. 28, 1999, at 1A.

64. See Schmidt & Martin, *supra* note 13.

distribute documents in those cases was modeled after the one created out of sheer necessity in the *Provenzano* case.⁶⁵ As commentators have noted:

Given the intense demand for immediate information on developments in the post-election legal fight, it was fortuitous that the battleground state was Florida. The Florida Supreme Court's ready capacity for distribution of parties' briefs and netcasts of oral arguments provided worldwide media and interested individuals with a relatively transparent view of the process. Although few Internet servers in the world can support such extreme and focused demand for bandwidth without some slowdown, Florida's experience with the *Provenzano* affair made it as ready as any state high court.⁶⁶

Moreover, the existing use of satellite broadcasts since 1997, fully tested by *Provenzano* and other cases, created media history: the two Supreme Court of Florida arguments associated with what later would be called *Bush v. Gore*⁶⁷ became and remain the only appellate arguments broadcast live in their entirety by all major television networks and cable news channels world-wide. Hence, the public nature of court proceedings in the United States was transformed in a very short period of time.

B. *Internal Case Assignments & Opinion Writing*

As the discussion about *Provenzano* suggests, the Court's work in writing official opinions is not conducted by all seven Justices simultaneously. Rather, work is randomly and proportionately delegated to individual offices. The system by which this delegation occurs is perhaps one of the least understood aspects of the Court's routine operations. As a result, parties sometimes have erroneously assumed that particular Justices have some unusual or unfair ability to control case assignments. The reality is the opposite. Justices, other than deciding general policy about assignments, play no role in the assignment process.

The actual method by which cases are assigned for opinion writing in the Supreme Court of Florida differs substantially from that used in the United States Supreme Court, in which seniority equates to power. In the latter Court, the assignment typically is made by the Senior Justice who is in

65. Florida Supreme Court at http://www.floridasupremecourt.org/pub_info/election/index.shtml (last visited Feb. 5, 2005).

66. Schmidt & Martin, *supra* note 13, at 325.

67. None of the pleadings in Florida were so titled. This popular reference to the cases became common because the case argued before the United States Supreme Court on December 11, 2000, received this case style.

the majority, with the Chief Justice always considered more senior than any other Justice. Thus, Senior Justices in the nation's highest court do, in fact, have an unusual ability to control case assignments.

In the Supreme Court of Florida, however, cases are assigned at random by the Office of the Clerk, and assignments typically are made as soon as briefing is completed. There are, however, some exceptions, discussed below.⁶⁸ In other words, case assignments in the Supreme Court of Florida are generally accomplished by a system of rotation. This can lead to situations in which the Justice assigned to write a majority opinion in a case may disagree with the majority viewpoint.

Under this rotation system, the case file is sent to the office of the designated Justice, who then usually will assign one of that office's law clerks⁶⁹ to begin preparing the case for ultimate disposition. The process that follows varies somewhat depending upon the type of case at issue. There are four broad categories of cases in which an opinion will be written or an order entered: 1) cases scheduled for oral argument and conferenced; 2) cases accepted without oral argument (no request cases) and conferenced;⁷⁰ 3) petitions by death-row inmates (death cases); and 4) special cases, often requiring expedited consideration by the Court.

1. Oral Argument Cases

In all cases scheduled for oral argument, the law clerk assigned to the case is required to write a memorandum reflecting original research on the law and the facts, as well as analyzing the parties' arguments and the issues of the case. A recommendation regarding the case's disposition is included.⁷¹ Prior to oral argument, each Justice is presumed to have read all of the briefs and the staff memoranda as well as to have conducted any additional research into the law or the facts deemed necessary. The Justices

68. See discussion *infra* Parts II.B.1-4.

69. Each of the Justices has three law clerks and a judicial assistant. Law clerks' exact titles vary according to seniority. The most junior are called staff attorneys followed by Senior Staff Attorney and then Career Staff Attorney. They are called law clerks, which is the term that will be used in this article.

70. The term "no request" is misleading. Many, if not most, of these cases had a request by at least one of the parties for oral argument. The term derives from the fact that the Court itself has not requested oral argument, meaning that any such request by the parties was denied.

71. This is a significant change since 1993, when law clerks only produced short summaries with no recommendation.

normally do not formally meet to discuss the cases in advance of oral arguments.⁷²

As noted earlier in the discussion of *Provenzano*, a closed-door conference of the seven Justices is usually held the day of oral argument, although conference may be delayed up to a few days due to conflicts in the schedules of the Justices. In some district courts of appeal, law clerks are permitted to attend court conferences or are even asked to participate in the judges' discussion of cases. However, in the Supreme Court of Florida, law clerks do not attend.⁷³

If a law clerk needs access to a Justice during a conference, they are permitted only a single liberty that is seldom exercised: knocking on the conference room door. An old custom—one increasingly honored more in the breach—dictates that the most junior Justice in the room answers the door.⁷⁴ New technology has changed this custom in one regard. Because the conference room is now computerized and at least one Justice has a computer working during conference, the clerk can send e-mails to the Justices if required.

The confidentiality surrounding conferences means that the Justices, and especially the Justice assigned to write an opinion, must take notes regarding the positions or reasoning espoused by the other members of the Court. The conference also is memorialized electronically. One Justice now records, via computer, what occurred at conference in a conference action agenda. The Clerk of Court, but no one else, can access this document while the conference is proceeding. The Chief Justice presides over the conference. During the conference, all of the Justices—beginning with the Justice whose office was initially assigned to work up the case—are given a chance to indicate their initial and tentative preferences regarding a case's disposition and these tentative views are recorded for later reference.⁷⁵ After the

72. Oral argument summaries, bench memoranda, and other documents associated with the preparation of a case are internal court documents related to the decision-making process and thus cannot be released to the public or any person not on the court's staff. Violation of this rule is considered an ethical breach and can be punished by contempt of court. In 1974, for example, the Court ordered one of its law clerks to show cause why he should not be held in contempt for releasing copies of oral argument summaries to unauthorized persons. Based on the mitigating evidence, the Court withheld a contempt citation but publicly reprimanded the law clerk and placed him on probation for a period of two years under close supervision. *In re Schwartz*, 298 So. 2d 355, 356 (Fla. 1974).

73. With increasing frequency, the Court does require staff and others to discuss administrative matters under consideration. There is no discussion of cases during these colloquies.

74. By tradition, the Court sits by seniority in the conference room. There are two doors to the conference room. One door is immediately adjacent to where the junior Justices sit.

75. These preferences are by no means final. Justices frequently change their minds after giving a case more thought, after closer review of the record or the law, or after another Jus-

assigned Justice announces her or his views, the other Justices in order of seniority give their views, with the Chief Justice speaking last.

If the view of the assigned Justice prevails, that Justice then has the responsibility of drafting a majority opinion. If the assigned Justice is in the minority, the Chief Justice still has the option of having that Justice draft the majority opinion in accordance with the views of the majority, or of assigning the opinion to the most senior Justice in the majority. Responsibility for opinion drafting varies from office to office in the Court. Some Justices prefer to draft their own opinions, with law clerks often being asked only to check the finished product for accuracy and style. Other Justices may orally outline their views to a clerk and assign the clerk the responsibility of producing an initial draft, with the Justice then taking over until a final draft is circulated. In still other offices, opinion drafting is a shared responsibility of the Justice and the assigned law clerk, and in some instances, involve every staff member in that office.

Of course, the legal analysis and reasoning of all opinions is discussed and agreed to at conference. However, the exact way an opinion will be written may be discussed in conference, but it usually is left to the discretion of the assigned Justice subject to some significant exceptions. For example, the Court has promulgated a system of legal style contained in rule 9.800 of *The Florida Rules of Appellate Procedure*.⁷⁶ For matters not covered in the rule itself, style is governed by the latest edition of *The Bluebook: A Uniform System of Citation*.⁷⁷ If nothing in *The Bluebook* is on point, style is governed by the *Florida Style Manual*.⁷⁸ If none of these sources are on point, the Court generally considers that style should be governed by the closest analogous rule or example contained in the three sources listed here, in the same order of preference. As a practical matter, most authorities not covered by the rule and style manuals are Florida documents, and these typically are dealt with by reference to the closest analogous rule or example from the *Florida Style Manual*.

tice proposes a different method of analysis or disposition. On occasion, the Court has decided a case contrary to the initial conference vote, although such instances are the exception rather than the rule.

76. See FLA. R. APP. P. 9.800.

77. FLA. R. APP. P. 9.800(n). *The Bluebook* is a compiled publication created by respective law reviews at Columbia University, Harvard University, the University of Pennsylvania, and Yale University. See THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 17th ed. 2000).

78. FLA. R. APP. P. 9.800(n) (referencing *Florida Style Manual*, 19 FLA. ST. L. REV. 525 (1991)); see also *Florida Style Manual*, 15 FLA. ST. U. L. REV. 137 (1987). The *Florida Style Manual* is published by the Florida State University Law Review.

Another significant exception deals with gender-specific language. In the wake of a report by a court commission investigating gender bias,⁷⁹ the Court now has instructed its staff and The Florida Bar agencies charged with developing rules of court to avoid all gender-specific language wherever possible. The most common methods of complying with the rule are to use plural pronouns instead of singular,⁸⁰ and to rewrite sentences so that gender-specific language is not needed.

In most instances, the parties have their greatest opportunity to influence the Court in their written briefs. While oral presentations happen only once, lawyers have substantial time to articulate the views of their clients in draft after draft of their briefs until they get it just right. Lawyers who fail to take advantage of this opportunity to get it just right do a disservice to their clients and their causes. Briefs are read, summarized, and subjected to vigorous critical analysis prior to oral argument. Briefs actually introduce the Court to the case.⁸¹ Obviously, a bad brief is a bad first impression, whereas a strong brief can strongly influence the initial views of the Justices on the case. Some cases may be won or lost in oral argument, but these are a minority and usually involve issues that were already close and difficult to resolve. Oral argument primarily allows the Justices to test the strengths and weaknesses of first impressions created by reading the briefs. In sum, attorneys should scrupulously prepare their briefs to the Court.

Style and content of briefs are governed by court rule.⁸² Beyond that, counsel should avoid presentations that create confusion as to the facts or issues. One practice sometimes used by respondents or appellees, for example, is to ignore the sequence of issues or arguments presented by the petitioners or appellants. This usually creates needless confusion and should be avoided. If the issues in the briefs do not match one another, the Court then must perform a kind of mental “cut and paste.” The better practice is to address the issues in the same sequence, even if only to note that an issue is redundant or irrelevant, and then to list separately and discuss any issues the

79. See Ricki Lewis Tannen, *Report of the Florida Supreme Court Gender Bias Study Commission*, 42 FLA. L. REV. 803 (1990).

80. In the English language, plural pronouns are inherently gender-neutral.

81. In another major change since the last version of this article, many documents must be submitted to the Court both on paper and electronically. See Fla. Admin. Order No. AOSC04-84 (Fla. Sept. 13, 2004) (on file with Clerk, Fla. Sup. Ct.), available at <http://www.floridasupremecourt.org/clerk/adminorders/2004/sc04-84.pdf> (last visited Feb. 5, 2005). In high-profile cases, the Court now routinely orders parties to submit all documents, including appendices, in an electronic format so they readily can be posted on the public information pages of the Court’s website.

82. FLA. R. APP. P. 9.210, 9.800.

opponent may have failed to raise but that are relevant to the disposition of the case.

Another practice to avoid is incorporating by reference an argument from a brief in a different proceeding or court, or even in the same case, except when the Court grants leave to do so. Often the other brief may not be readily available, or may require needless effort, and the net result renders the current brief unintelligible on its face. It is always better to make sure a complete statement of the argument can be found within the four corners of the brief.

One peculiarity of the Court's method of blind assignment of cases is that the initially assigned Justice's vote may not always be in the majority. However, under long-standing Court custom, this fact alone does not disqualify that Justice from writing the proposed majority opinion. Most often, the assigned Justice will agree to write an unsigned *per curiam* opinion⁸³ reflecting the views of the majority, with the Justice also writing a separate opinion expressing any contrary views. If an assigned Justice feels unable to develop the majority's proposed opinion or if there is an objection, the case can be reassigned to another Justice at conference. All reassignments lie within the discretion of the Chief Justice, though in practice the case is usually transferred to the senior Justice in the majority who first expressed the view adopted by the majority. However, on occasions when the conference vote is close or fails to establish a tentative majority, the assigned Justice may circulate a proposed majority reflecting that Justice's views, with the hope that other offices will find the analysis compelling. Less commonly, a Justice may circulate two or more proposed majority opinions in the same case, thereby giving the Court options from which to choose.

Once a proposed majority opinion is circulated, each Justice must vote on the proposal. Technology has again resulted in a major change in how voting is done. Previously, a written vote sheet was prepared and attached to each proposed opinion. The vote sheet included a listing of each kind of vote possible for the type of case in question.⁸⁴ All voting was then done manually on the vote sheets, with the Justices voting by placing their initials next to the voting category they prefer.⁸⁵ Now all voting on opinions is done via computer using an application developed by the Court's technology staff, called eVote. This application records votes electronically in a secure data-

83. *Per curiam* opinions as they are used by the Supreme Court of Florida are discussed within the text. See discussion *infra* Part II.D.

84. The possible votes vary according to the kind of case.

85. If a Justice is out of town and there is a pressing need for a vote on the case, the Justice by telephone or e-mail may authorize a staff member to indicate the proper vote.

base. However, the Justices continue to indicate their votes on paper copies as a backup, and these copies are kept by the Clerk's office.

By custom, the Justices usually cast only three types of votes that do not require a separate opinion. These are: concur, concur in result only, and dissent.⁸⁶ Of course, each Justice can write a separate opinion. The kinds of separate opinions are discussed more fully below.⁸⁷

During the voting process, it is not unusual for the Justices to continue to exchange views either in writing or by personal visits. Once all votes are recorded, one of two things will occur. If the case has generated no further debate among the Justices, it will be routed to a professional reporter of decisions in the Chief Justice's office to be checked for substantive and stylistic problems before being released to the parties and the public. However, if some debate remains, the case will be scheduled for a second court conference. When this happens, the case is routed to a staff member in the Chief Justice's office to be included on the next available conference agenda.⁸⁸ At conference, the Justices will discuss the case and decide on any further action that may be necessary. Frequently, only minor revisions are made in opinions to satisfy the concerns of particular Justices.

Occasionally it becomes apparent during a conference, or after voting, that a majority of the Court does not agree with the proposed majority opinion that was circulated, and the Chief Justice may reassign the case to be written by a Justice in the new majority.⁸⁹ Sometimes when it is apparent

86. These votes mean precisely what they say. Concur indicates a full acceptance of the majority opinion and decision. Concur in result only indicates an acceptance only of the decision, and a refusal to join in the analysis expressed in the opinion. Dissent indicates a refusal to join in either the decision or opinion. Members of the Court usually do not specially concur or concur in part and dissent in part unless they also write a separate opinion, although there are exceptions even here. *E.g.*, *Maison Grande Condo. Ass'n, Inc. v. Dorten, Inc.*, 600 So. 2d 463, 465 (Fla. 1992) (McDonald, J., concurring in part, dissenting in part). Moreover, in death penalty cases, each Justice votes separately as to conviction and sentence. Therefore, a Justice can concur as to the conviction but dissent as to the sentence without writing a separate opinion. *E.g.*, *Maharaj v. State*, 597 So. 2d 786, 792 (Fla. 1992) (McDonald, J., concurring as to conviction, dissenting as to sentence). Though less common, Justices also may vote separately as to punishment in cases of attorney discipline. *E.g.*, *The Florida Bar v. Morse*, 587 So. 2d 1120, 1121 (Fla. 1991) (McDonald, J., concurring as to guilt, dissenting as to punishment).

87. See discussion *infra* Part II.C.

88. Conference agendas are produced by the office of the Chief Justice.

89. For example, a Justice may have written a separate dissenting opinion that clearly reflects the views of at least four members of the Court. In such cases, the Court's majority and the Chief Justice may agree informally among themselves that the author of the dissent will simply recast the dissent as a majority and circulate it to the full Court without need for a conference discussion. In that case, the now failed majority opinion may be recast as a dissent.

that the proposed majority opinion has failed to garner four votes, the Clerk prepares a memorandum to the Chief Justice advising him of that fact. However, the original author of the failed majority opinion sometimes may be given an opportunity to write a new *per curiam* opinion that conforms to the majority's views, perhaps accompanied by a separate opinion expressing any divergent views of the author.

Once all questions regarding a case are settled and the opinion or opinions have been proofread and approved for release, the Clerk's office will set a tentative date for the opinion to be released. However, no opinion can be issued except upon the signature of the Chief Justice. Typically, opinions are scheduled for release no earlier than a week in advance.⁹⁰ Copies of the final version of the opinion or opinions are circulated by the Clerk to all Justices and each member of their staffs, and all staff attorneys who work for the court one week prior to the scheduled release the following Thursday. The purpose of this exercise is to allow for continuous quality control and further proofreading of opinions right up until the time of release. Justices, their staffs, and the Clerk's office sometimes find errors or inconsistencies not caught during the normal proofreading process.

When the Clerk's office determines that a case has the necessary votes for release, the case is sent to the Reporter of Decisions for technical review. The Reporter of Decisions then directs the Clerk in writing to file any opinion to which at least four Justices have subscribed.⁹¹ Copies of opinions ready for release to the public are delivered to each Justice no later than Thursday at noon the week before actual release. At any time before 10 a.m. on Thursday of the following week, any Justice may direct the Clerk not to release an opinion. Unless otherwise directed by this day and time, the Clerk and the Director of Public Information release the opinions at 11 a.m.

Another significant change since this article was first written in 1993 is the way in which opinions are released at the Court. Previously, the Court maintained a press room in which paper copies of opinions would be stacked on a large table for release to media. Only paper copies were considered the official release at this time. The door to the press room would remain locked until the time for release, and the opening of the door thus marked the official moment of release. Beginning in the mid-1990s, however, the Court began posting its opinions on its website at the time of release. Media and

90. This is not true, however, of some emergency cases such as collateral challenges by death-row inmates scheduled for execution. When some urgency is involved, the Chief Justice has discretion to order opinions released at any time after voting is finalized and the Justices have resolved any differences as fully as is possible.

91. A minimum of four Justices must concur at least in the result reached under the state constitution. FLA. CONST. art. V, § 3(a).

the public in general became increasingly accustomed to this electronic release, though many longtime members of the Tallahassee capital press corps continued to stand outside the door of the press room every Thursday. However, in 2001 the Clerk and the Court's Public Information Officer polled the press corps about their willingness to replace the existing system with a purely electronic one. With little dissent, the press corps accepted this change. Opinions now are posted on the Court's website under the Court Decisions & Rules link⁹² as soon as possible after 11 a.m., and media are simultaneously notified by means of an e-mail list reserved exclusively for media. These electronic releases now constitute the official release of opinions, and paper copies are no longer produced. The press room now has been moved into a smaller room, since its only remaining use is as a distribution point for the video and audio of court arguments to broadcast media.⁹³

Opinions are not considered final until any motion for rehearing or clarification is disposed of. However, there are some cases in which the Court notes that rehearing or clarification will not be entertained. For example, the Court routinely notes that it will not entertain motions for rehearing or clarification in cases requiring immediate finality, such as cases in which a death warrant is pending, or after an opinion has been revised upon the granting or denial of a motion for rehearing or clarification.

2. "No Request" Cases

A substantial percentage of the Court's docket consists of cases in which oral argument is not granted. These can include cases in which oral argument was sought but denied, the majority of contested Florida Bar discipline cases, and a few other categories. These cases are decided in the same manner as oral argument cases except that no oral argument in the courtroom is entertained.

After all briefing is complete, the "no request"⁹⁴ case is randomly assigned to an office⁹⁵ much like oral argument cases. The assigned Justice

92. See Court Decisions & Rules at <http://www.floridasupremecourt.org/decisions/index.shtml> (last visited Feb. 5, 2005).

93. A live feed of video and audio is available at this location. A distribution device called a mult box allows multiple users to plug into the feed simultaneously and record it. Because the Court also broadcasts live via satellite, there has been a growing trend for broadcasters to prefer the satellite feed over the press room feed.

94. There is no absolute right to oral argument in any case, although the Court's Manual of Internal Operating Procedures requires that oral argument always be scheduled in every appeal from a judgment imposing a death sentence. MANUAL OF INTERNAL OPERATING PROCEDURES, *supra* note 20, at § II(B)(3).

then directs a law clerk to prepare a summary and memorandum that is similar to the staff memorandum prepared in oral argument cases. The memorandum contains research on the law and facts and a recommended disposition.

The case is then scheduled for discussion at the next available court conference. At this time, the Justices discuss their views, again with the assigned Justice going first, and a vote is taken. The preparation of an opinion is done in the same way as in an oral argument case, and the proposed majority opinion is circulated to the entire Court. Any differences among the Justices are resolved in the same manner as would apply in oral argument cases, including additional conference discussions as needed. Once all the Justices are satisfied that no further debate remains about the case, the majority opinion and any separate opinions are prepared for public release.⁹⁶

3. Death Penalty Cases

Appeals from judgments imposing the death penalty are treated like any other oral argument cases, and are assigned for oral argument as soon as briefing is completed. The Court traditionally follows a somewhat different procedure in collateral challenges by death row inmates. Many of these cases involve appeals of claims raised via a traditional habeas corpus petition or through the related procedure set forth in rule 3.850⁹⁷ of the *Florida Rules of Criminal Procedure* and its related rules 3.851, 3.852, and 3.853. Occasionally, other means of collateral review are sought, including the Court's all writs jurisdiction,⁹⁸ mandamus,⁹⁹ or other means. Of course, the most pressing of these cases involve claims by inmates who have been scheduled for execution by issuance of a death warrant by the Governor. These cases are put on a special scheduling track because they are expedited.

Appeals of collateral challenges in death penalty cases are handled much the same as other cases. Oral argument is almost always granted, but can be denied—unlike in appeals from judgments imposing the death penalty

95. There are exceptions to the random assignment process, most commonly, where a number of cases all pose the same issue. In such circumstances, all the cases may be assigned to the same office. See discussion *infra* Part IV.B, regarding the discussion of cases involving similar issues, also called “tag cases”.

96. “No request” cases are prepared for release in the same manner as other cases.

97. Although habeas corpus and rule 3.850 and 3.851 have some differences, the Court has held that they constitute a procedural vehicle for providing relief otherwise available through habeas corpus. *State v. Bolyea*, 520 So. 2d 562, 563 (Fla. 1988); see discussion *infra* Part VII.D.

98. See discussion *infra* Part VII.E.

99. See discussion *infra* Part VII.A.

where oral argument is always granted.¹⁰⁰ In addition to the staff research on the law and the facts, an assigned Justice's staff attorney will include details of the entire procedural history of the case, from trial to the latest collateral challenge, and the issues previously raised and their outcomes.¹⁰¹ Opinions are usually issued for each collateral challenge filed, though the Court sometimes denies a claim in a summary order if it is determined that a claim clearly is barred or meritless.

When a death warrant is issued, the Court usually anticipates that some action will be taken in the trial court on behalf of the prisoner and the Court sets a briefing schedule and oral arguments for any subsequent appeal, to take place before the warrant period ends. The assigned Justice's staff will prepare a chronological history of past proceedings in the case and provide that to all the Justices. If an appeal is filed, the Court adheres to the previously issued schedule, and staff memoranda are prepared and circulated on an expedited basis. The case is discussed and decided at a conference immediately after oral argument, and the assigned Justice expedites the preparation and circulation of an opinion. One of the factors that the Court considers in expediting the release of an opinion is whether there will be some time, however brief, for the prisoner to seek further relief in the federal courts after the state remedies are exhausted. Of course, depending on the circumstances of the individual case, it may also be necessary for the Court to issue a stay of the execution, either to permit adequate consideration of the claims, or because a particular claim may be found to have merit.

As the time for the inmate's execution approaches, the Clerk of the Court, the assigned Justice, and assigned Justice's staff remain on call twenty-four hours a day for any last minute petitions that may be filed. By custom, the Chief Justice or a Justice designated by the Chief Justice will be present in the Florida Supreme Court building at the time of execution and is usually assisted by the Clerk of the Court, the Public Information Officer, and sometimes also by the staff of the Justice assigned to the case.¹⁰² There also are a number of deputy clerks on standby in case an emergency order needs to be issued. The Governor or a member of the Governor's staff opens

100. MANUAL OF INTERNAL OPERATING PROCEDURES, *supra* note 20.

101. In order to better facilitate the decision-making process in death penalty cases, the Clerk's office tracks all proceedings no matter what court is reviewing them, for death row inmates. This information is kept on what the Clerk's office refers to as the death penalty module on the Court's case management system. This allows the Court to determine the current status on any death row inmate. Because this information is used in the Court's decision making process, it is exempt from public disclosure.

102. The law clerk's presence may be especially important if there is any concern that a legal issue might be raised at the last minute.

a three-way telephone communication between the Governor's Office, the death chamber of the state prison, and the Clerk's office at the Court. The Chief Justice, the assigned Justice, the Clerk, and the Public Information Officer gather in the Clerk's office. All three groups remain on the phone to consider any last-minute issues, until the execution is completed and the inmate is declared dead. Under the Florida Constitution, any single Justice could order the execution stayed for good reason shown,¹⁰³ but this power has only been exercised in emergencies.¹⁰⁴ Any problems associated with the execution detected at this time are reported back to the full Court.¹⁰⁵

4. Other Cases

The Court sometimes receives other cases, often involving important or emergency issues that ultimately may be resolved in a written opinion. Examples include: pressing constitutional questions between the branches of state government,¹⁰⁶ requests for an advisory opinion by the Governor,¹⁰⁷ or a petition to invoke the Court's own emergency rule-making powers.¹⁰⁸ Oral argument is often granted in cases of this type, though not always, with argument usually scheduled as soon as possible. Whether accepted for argument or not, emergency matters are normally handled like any other case, except that the process and preparation of the opinions usually is expedited and the case is assigned to an office by the Chief Justice.¹⁰⁹ The opinions

103. See FLA. CONST. art. V, § 3(b)(9). Of course, the full Court could probably dissolve any stay improvidently granted. See *id.*

104. Because of the timing of one execution, the Chief Justice, the Clerk, the Public Information Officer, and a number of the other Justices were not in the Supreme Court Building at the time of execution. A last-minute motion was filed. The senior-most Justice in the building at the time, the acting Chief Justice under the Court's rules, issued a temporary stay long enough to assemble the other Justices and the Clerk. A four-way phone connection was established.

105. For example, the problems associated with three executions in Florida's electric chair were reported back to the full Court by the Justices assigned to be present in the Supreme Court Building during the executions.

106. *E.g.*, Fla. House of Representatives v. Martinez, 555 So. 2d 839 (Fla. 1990); The Fla. Senate v. Graham, 412 So. 2d 360 (Fla. 1982).

107. *In re* Advisory Opinion to the Governor, 509 So. 2d 292 (Fla. 1987).

108. *In re* Emergency Petition to Extend Time Periods Under All Fla. Rules of Procedure, 17 Fla. L. Weekly S578 (Fla. Sept. 2, 1992) (emergency rule-making related to Hurricane Andrew). This particular case has been codified and supplemented by changes to rule 2.030(a)(2)(B)(iv) of the *Florida Rules of Judicial Administration* granting the Chief Justice authority to toll time limits because of emergencies. *Id.*

109. Emergency cases are thus an exception to the Court's random assignment system. The Chief Justice has broad discretion over these assignments, subject as always to the will of

themselves may be released outside the normal Thursday cycle if necessary to resolve the particular issue or emergency.

C. *Types of Separate Opinions*

As noted above, the Supreme Court of Florida follows the traditional practice of American appellate courts in assigning a single Justice to write the majority opinion in a case. However, Justices are not obligated to agree with the proposed majority opinion's viewpoint or even with the unsigned majorities they themselves have written. Any view apart from the majority's is expressed through the vehicle of a separate opinion attached to and published with the majority opinion.

Although most of the Court's decisions are unanimous, the public and press have a strong tendency to focus on disagreements embodied in separate opinions. Strongly worded dissents catch the most attention. This public focus can create a seriously exaggerated sense of division on the Court and may suggest that dissents carry a legal significance that they actually lack. Dissenting views usually are the least influential in the long term, because of the very nature of a dissent—the expression of a view contrary to that of the majority.¹¹⁰ On the other hand, a well-reasoned concurring opinion, while technically not establishing any precedent,¹¹¹ may still be cited for persuasive authority in future cases and occasionally may become more influential than the majority opinion to which it was attached.¹¹² Of course, there are occasions when future majority opinions directly reject the reasoning of earlier concurrences.¹¹³ Dissenting views also sometimes prevail in the long run,¹¹⁴

the full Court, but often may assign the case to an office with special expertise in the field or one that is most current in its workload. This is rarely done.

110. See *Ephrem v. Phillips*, 99 So. 2d 257 (Fla. 1st Dist. Ct. App. 1957). It is worth noting, however, that dissents often contain statements that are dissent dicta because they exceed the scope of what the majority is deciding. A majority opinion should not be read as rejecting extraneous dissent dicta, but only as rejecting anything in the dissent contrary to what the majority has actually said. There are occasions when dissent dicta may later be embraced by a majority without overruling any prior opinion. Some attorneys erroneously assume that the majority necessarily has rejected everything stated in a dissent.

111. *Greene v. Massey*, 384 So. 2d 24 (Fla. 1980).

112. See, e.g., *In re Forfeiture of 1976 Kenworth Tractor Trailer Truck Altered Vin 243340M*, 576 So. 2d 261, 262–63 (Fla. 1990) (applying *Wheeler v. Corbin*, 546 So. 2d 723, 724–26 (Fla. 1989)) (Ehrlich, C.J., concurring).

113. *N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612, 665–66 (Fla. 2003).

114. E.g., *Pullum v. Cincinnati, Inc.*, 476 So. 2d 657, 659–60 (Fla. 1985), receding from *Battilla v. Allis Chalmers Mfg. Co.*, 392 So. 2d 874 (Fla. 1980). In *Pullum*, the Court ex-

but this is a far rarer occurrence. To embrace a prior dissent, the Court usually must overrule its own precedent notwithstanding the doctrine of stare decisis;¹¹⁵ while a well-reasoned concurrence can be accepted without necessarily overruling anything, on grounds that it better illuminated or explained the majority opinion it accompanied.

Concurrences and dissents, however, constitute only two of five different kinds of separate opinions that are in customary usage by the Court, although there is a sixth type so rare it has been used only once. This variety has sometimes confused lawyers and the public alike, because the Court has never adopted precise rules governing the use of separate opinions. Confusion sometimes arises because the categories are not necessarily discrete and often blur into one another. Much depends on precisely what the individual author has stated in the separate opinion, although the choice of category is often a strong indicator of the strength of the author's feelings about the majority view.

There has been some concern in recent years that these traditional categories are not sufficient. The specific concern involves situations in which a Justice agrees with the result of an opinion and perhaps much of the analysis, but not all of it. Justices sometimes have concurred in the result only—something that may suggest they only agree with the outcome but disagree with the entire analysis even if this is not the case. At other times, Justices have concurred in part and dissented in part in the same case, which can sug-

pressly embraced Justice McDonald's dissent in *Battilla*. Compare *Battilla*, 392 So. 2d at 874–75 (McDonald, J., dissenting) with *Pullum*, 476 So. 2d at 659–60.

115. Many people erroneously view stare decisis as rigidly inflexible. The Court, however, has held that “stare decisis is not an ironclad and unwavering rule that the present must bend to the voice of the past, however outmoded or meaningless that voice has become. It is a rule that precedent must be followed *except* when departure is necessary to vindicate other principles of law or to remedy continued injustice.” *Haag v. State*, 591 So. 2d 614, 618 (Fla. 1992) (citing *McGregor v. Provident Trust Co.*, 162 So. 323 (1935)). In a similar vein, the Court has said that “the common law will not be altered or expanded unless demanded by public necessity ... or where required to vindicate fundamental rights.” *In re T.A.C.P.*, 609 So. 2d 588, 594 (Fla. 1992). Although attorneys sometimes incorrectly argue that only the legislature can change the common law, the Court in actuality has not hesitated to change the law when proper reasons exist to do so, at least where the legislature has taken no action on the precise subject. *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130, 132 (Fla. 1957); *see, e.g., Waite v. Waite*, 618 So. 2d 1360, 1361 (Fla. 1993) (abrogating common law doctrine of interspousal immunity); *Hoffman v. Jones*, 280 So. 2d 431, 434 (Fla. 1973) (abrogating common law doctrine of contributory negligence). Common law refers to law that has arisen from the customary practices of the courts of Florida and their predecessors, which exists in its most authoritative form when embodied in the written opinions of the Supreme Court of Florida. Once common law is codified within a legislative enactment, the Court is far more hesitant to overrule it, because of the doctrine of separation of powers. *See* FLA. CONST. art. II, § 3.

gest that they do not agree with part of the result and it is for this reason they cannot join. There has been some discussion of adopting a practice used as the United States Supreme Court, where Justices sometimes write opinions concurring in the judgment or some variation such as concurring in part and concurring in the judgment. However, the Justices have chosen not to adopt this practice.

The following six categories of opinions utilized by the Justices are identified and their customary usage are described. This ranking begins with the category having the strongest sense of concurrence and ends with the category having the strongest sense of dissent.

1. Concurring Opinions

A separate concurring opinion usually indicates that the Justice fully agrees with the majority opinion but desires to supply additional reasons for supporting the decision and to make additional comments or observations. Concurring opinions often are used when a Justice wishes to explain individual reasons for concurring with the majority. As a general rule, concurring opinions should be presumed to indicate complete agreement with the majority opinion unless the concurring opinion says otherwise. Thus, a concurring opinion can constitute the fourth vote needed to establish both a decision and a Court opinion,¹¹⁶ subject only to any reservations expressly stated in the concurring opinion itself.¹¹⁷

116. See FLA. CONST. art. V, § 3(a). There is a distinction between the terms decision and opinion. The decision is the court's judgment, i.e., the specific result reached. Whereas, the opinion is the written document explaining the reasons for the decision. *Seaboard Air Line R.R. Co. v. Branham*, 104 So. 2d 356, 358 (Fla. 1958). Thus, so long as at least four members of the Supreme Court of Florida agree on the decision, it is irrelevant that no similar agreement was reached regarding a written opinion. Similarly, at least four Justices must concur in an opinion for it to have any precedential value beyond the case at hand. *Greene v. Massey*, 384 So. 2d 24, 27 (Fla. 1980). However, the word decision may have a different meaning in the context of the Court's jurisdiction over particular categories of decisions. See discussion *infra* Part II.D.

117. Such reservations, depending on their strength, may give the concurrence the appearance of actually being a special concurrence or a concurrence in result only. However, the fact that the author has chosen to concur necessarily implies a greater sense of agreement with the majority view. However, attorneys and lower courts may still legitimately take note of any reservations expressed in a concurrence, especially where they may indicate that at least four Justices have not agreed on a relevant point.

2. Specially Concurring Opinions

A specially concurring opinion¹¹⁸ indicates general agreement with both the analysis and result of the majority opinion but implies some degree of elaboration of or addition to the majority's rationale, unless the separate opinion itself says otherwise. The most common use of a special concurrence is when the author believes the majority's analysis is essentially correct though, perhaps, in need of elaboration or clarification. For example, a specially concurring opinion may be used to explain why, in the author's view, a separate dissenting opinion has mischaracterized the majority's views and why the majority is correct.¹¹⁹ Hence, the author believes something additional should be said, even if for a limited purpose.

A specially concurring opinion can constitute the fourth vote needed to create a binding decision under the state constitution¹²⁰ and can be sufficient to establish an opinion as binding precedent. However, in this last instance, the true nature of the precedent would not necessarily consist of the plurality opinion, the special concurrence, or even both taken together. Rather, the Court's opinion for purposes of precedent would consist of those principles on which at least four members of the Court have agreed.¹²¹ In other words, it is possible for a special concurrence to be sufficiently narrow as to deprive a plurality opinion of precedential value with respect to matters about which the concurring Justice has expressed disagreement or reservations.

3. Opinions Concurring in Result Only

A concurring in result only opinion indicates agreement only with the decision, that is, the official outcome and result reached, but a refusal to join in the majority's opinion and its reasoning.¹²² A separate opinion that concurs in result, only can constitute the fourth vote necessary to establish a

118. Members of the Court sometimes label this type of separate opinion concurring specially. This label is synonymous with specially concurring. The transposition is a matter of each individual Justice's preference.

119. *E.g.*, *Pub. Health Trust of Dade County v. Wons*, 541 So. 2d 96, 98–102 (Fla. 1989) (Ehrlich, C.J., concurring specially).

120. FLA. CONST. art. V, § 3(a).

121. An example of such a case is *In re T.W.*, in which Chief Justice Ehrlich specially concurred but expressed reservations about certain points in the plurality's analysis. 551 So. 2d 1186, 1197–1200 (Fla. 1989).

122. *Rowe v. Winn-Dixie Stores, Inc.*, 714 So. 2d 1180, 1181 (Fla. 1st Dist. Ct. App. 1998).

decision under the Florida Constitution,¹²³ but the effect in such a case is that there is no majority opinion of the Court and thus no precedent beyond the specific facts of the controversy at hand.¹²⁴ There may be cases in which a Justice writes a concurring in result only opinion that also appears to agree with more than just the result. However, it seems doubtful that such an action could constitute the fourth vote needed to give the opinion validity as precedent.

4. Opinions Concurring in Part, Dissenting in Part

An opinion that concurs in part and dissents in part is commonly used to indicate disagreement with only one or some of the results reached by the majority opinion, but may also be used to show disagreement with part of the analysis of the majority, depending on what the separate opinion itself actually says. Where an opinion of this type establishes part of the Court's majority, a careful reading of the different opinions may be needed to ascertain the votes on a particular issue or particular line of reasoning and, hence, the actual precedent of the case.¹²⁵

5. Dubitante Opinions

The rarest category of separate opinions are those issued dubitante,¹²⁶ a notation expressing serious doubt about the case. Only one such opinion has been issued in the Court's entire history.¹²⁷ With this sparse usage, it still is

123. FLA. CONST. art. V, § 3(a). For an example of a case in which the fourth vote concurred in result only, see *Dougan v. State*, 595 So. 2d 1, 6–8 (Fla. 1992). The result is that there is a decision in *Dougan*—in other words, a result in which at least four Justices concurred—but no court opinion.

124. See *Greene*, 384 So. 2d at 27.

125. The Supreme Court of Florida has not consistently followed the United States Supreme Court's practice of dividing opinions into numbered sections, in which members separately can indicate agreement or disagreement. There are exceptions, e.g., *Traylor v. State*, 596 So. 2d 957, 974–85 (Fla. 1992), but most opinions of the Supreme Court of Florida are not divided in this manner. This means that a careful reading may be necessary to determine the actual majority position; and in some cases, the true majority view simply may be unclear. However, the Supreme Court of Florida's practice has the grace of avoiding the fractured opinions sometimes found in the United States Supreme Court, in which two or more Justices may separately write and sign parts of opinions that collectively constitute the "majority" view.

126. The term dubitante means doubting. BLACK'S LAW DICTIONARY 499 (6th ed. 1990).

127. *In re Constitutionality of Senate Joint Resolution 2G*, 601 So. 2d 543, 549 (Fla. 1992) (Barkett, J., dubitante). It should be noted that other separate opinions have been written that in effect constituted a species of dubitante opinion, but without using the designation dubi-

not entirely clear in Florida whether a dubitante opinion should be regarded as a type of concurrence or dissent or something else,¹²⁸ or indeed, whether a dubitante opinion can constitute the fourth vote necessary to fulfill the constitutional requirement that four Justices must concur in a decision.¹²⁹ The failure of any Justice to issue a dubitante opinion since its single use in 1992 strongly implies that it has not been accepted by the Justices for routine use, a conclusion reinforced by the fact that dubitante does not appear as an option on the Court's computerized eVote system.

In the federal system, an opinion designated dubitante at least sometimes appears to constitute a very limited form of concurrence,¹³⁰ and some federal judges have gone to the trouble of designating their opinions as concurring dubitante.¹³¹ At least one has issued a dubitante opinion that expressly concurred in part and dissented in part, although the author seemed to indicate doubts only as to the partial concurrence.¹³² Other states have also used such opinions.¹³³

tante. *E.g.*, *Johnson v. Singletary*, 612 So. 2d 575, 577-81 (Fla. 1993) (Kogan, J., specially concurring).

128. The single instance in which a dubitante opinion was issued in Florida suggests that it indicated neither a concurrence nor dissent, but rather a statement of complete doubt as to the disposition of the case. *See In re Constitutionality of Senate Joint Resolution 2G*, 601 So. 2d at 549.

129. *See* FLA. CONST. art. V, § 3(a).

130. *See* *Case-Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384, 403 (1967) (Douglas, J., dubitante); *Radio Corp. of America v. United States*, 341 U.S. 412, 421-27 (1951) (Frankfurter, J., dubitante). Indeed, some federal judges have marked their separate opinions with the heading concurring but have indicated in the text that the opinion is dubitante. *New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 619-21 (1947) (Rutledge, J., concurring).

131. *E.g.*, *Feldman v. Allegheny Airlines, Inc.*, 524 F.2d 384, 390-93 (2d Cir. 1975) (Friendly, J., concurring dubitante).

132. *United States v. Walker*, 9 M.J. 892, 894-97 (A.F.C.M.R. 1980) (Mahoney, J., dissenting in part, concurring in part, and dubitante).

133. For example, in Georgia, the courts have sometimes issued "dubitante" dissents, apparently meaning dissenting views in which the author has serious doubt. *E.g.*, *Kelleher v. State*, 371 S.E.2d 450, 451 (Ga. Ct. App. 1988) (Deen, P.J., dissenting dubitante); *City of Fairburn v. Cook*, 372 S.E.2d 245, 255-56 (Ga. Ct. App. 1988) (Deen, P.J., dissenting dubitante). Thus, a dubitante dissent would seem to constitute a species of dissenting opinion less vigorous than a full dissent. However, there also seem to be times when an opinion marked merely dubitante is neither a dissent nor a concurrence, but an expression of doubts so grave that the judge or justice can neither agree nor disagree with the majority. *See Constitutionality of Senate Joint Resolution 2G*, 601 So. 2d at 549. This probably is the best construction, for example, in those rare cases in other jurisdictions in which a judge votes "dubitante" without writing a separate opinion. *Adams v. Williams*, 838 S.W.2d 71, 73 (Mo. Ct. App. 1992) (Crandall, J., dubitante). In the absence of a written opinion, it is impossible to tell what the author's views were, other than an expression of doubt.

A statement that the Justice concurs dubitante certainly would seem necessary where the dubitante opinion is relied upon as the fourth vote needed to create a binding decision; but even then, it remains to be seen whether that concurrence would give the written opinion itself the value of precedent. Some diminished form of precedential value might be in order in such a situation, but only where it is clear from a careful reading of the different opinions that at least four members of the Court, in fact, have agreed on some rationale, not merely the result. Otherwise, there would be no opinion by the Court, and the plurality's view would not create precedent beyond the case at issue.

6. Dissents

A dissenting opinion should be presumed to indicate a complete refusal to join with the majority's decision and opinion. A close reading of some dissenting opinions may disclose that the author actually only disagrees with part of the majority opinion,¹³⁴ and such a dissent could be read as though it were an opinion concurring in part and dissenting in part. But the fact that the Justice has labeled the separate opinion as a full dissent almost certainly means the opinion could not constitute the fourth vote needed to create a binding opinion or decision by the Court.

D. *Per Curiam* Opinions

Per curiam is a Latin phrase meaning "by the court."¹³⁵ At one time, the Supreme Court of Florida followed the practice, still common in the district courts of appeal, of issuing cursory opinions designated *per curiam*, with the actual identity of the author not disclosed. This was the general sense conveyed by the Court in 1956 when it defined the term *per curiam* as indicating "the opinion of the court in which the judges are all of one mind and the question involved is so clear that it is not considered necessary to elaborate it by any extended discussion."¹³⁶ Historically, then, *per curiam* opinions came to imply short opinions devoid of a rationale. Some attorneys and even judges have ruefully noted the potential for abuse inherent in the power to

134. *E.g., In re T.W.*, 551 So. 2d 1186, 1204-05 (Fla. 1989) (McDonald, J., dissenting) (dissenting opinion agreeing with part of plurality's rationale).

135. BLACK'S LAW DICTIONARY 1136 (8th ed. 1990).

136. *Newmons v. Lake Worth Drainage Dist.*, 87 So. 2d 49, 50 (Fla. 1956).

issue such opinions,¹³⁷ because even a “clear” rationale helps no one if left unstated.

After the creation of the district courts of appeal and the later adoption of jurisdictional reforms, the use of per curiam opinions in this sense has fallen into disuse in the Court.¹³⁸ The Court now seldom issues unsigned opinions devoid of an obvious rationale. The few that might qualify under this old definition typically involve questions of law now fully resolved in a recently issued opinion, to which the lower courts and parties are referred.¹³⁹ Instead, the Court’s per curiam opinions have metamorphosed into majority opinions with complete analyses whose authors simply are not identified.¹⁴⁰ The news media typically call such opinions unsigned.¹⁴¹

There are a variety of reasons for not identifying the true author or authors.¹⁴² One is because the author of the majority opinion actually may disagree with its analysis, something that can occur because of the Court’s method of assigning cases for opinions.¹⁴³ Another reason may be that portions of the opinion were written by more than one Justice or contain a rationale requested by a Justice as a condition of joining the majority. As a matter of courtesy, Justices usually avoid claiming credit for material partially written or suggested by another Justice. Such a per curiam opinion might be issued, for example, when a majority of the Court has not agreed with the full analysis of a proposed majority opinion and has decided to engraft onto that opinion part of a separate analysis prepared by another Justice.

The decision to make an opinion per curiam is left to the discretion of the Justice who drafted the opinion. There also are some traditions or patterns that have emerged through the years. For example, subject to some exceptions, most Bar discipline cases and disciplinary actions against judges

137. Toby Buel, *Conflict Review in the Supreme Court of a DCA’s Per Curiam Decision*, 56 FLA. B.J. 849 (1982).

138. The bulk of the Court’s jurisdiction now is discretionary, in which case the Court has authority simply to deny jurisdiction. This is vastly different than the situation that existed when the Supreme Court of Florida was the state’s only appellate tribunal, with much broader mandatory jurisdiction.

139. E.g., *State v. M.S.P.*, 647 So. 2d 847 (Fla. 1995).

140. E.g., *Gordon v. State*, 863 So. 2d 1215, 1217 (Fla. 2003).

141. The media also sometimes mischaracterize such cases as being written by the Chief Justice. If the opinion is per curiam the concurring Justices names are listed at the end of the opinion by seniority, meaning if the Chief Justice is in the majority, he or she is always listed first. This sometimes has led the press to believe that the Chief Justice is the author.

142. Members of the Court, including the true author, still must indicate their votes regarding a per curiam opinion, and those votes are recorded with the published opinion. There is no anonymity in this sense. Moreover, only a majority opinion can be issued per curiam. The Court has never issued, for example, per curiam dissents or concurrences.

143. See discussion *supra* Part II.B.

are now issued per curiam. The same is true of most death penalty cases. There is no way for the public to know the reasons an opinion was issued per curiam, and it would be considered a breach of confidentiality for the Justice or staff to publicly identify the true author. In any event, the fact that an opinion is issued per curiam by the Supreme Court of Florida has no significant effect other than to identify the Court itself, as an institution, and not any particular Justices as the author. Per curiam opinions bear the same status as any other opinion in which the Justices have voted the same way.¹⁴⁴

E. *Role of the Chief Justice or Acting Chief Justice*

The Chief Justice is Florida's highest ranking judicial officer, serving both as head of the Court and chief executive officer of the entire Florida Judicial Branch.¹⁴⁵ The Chief Justice presides at all official Court functions and administers the state court system through the Office of State Courts Administrator. One of the Chief Justice's most significant powers in a legal sense is the ability to dispose of motions and procedural matters connected with pending cases.¹⁴⁶ This is a marked change from earlier court practice, which required a meeting of the Court to consider motions. Today, some motions may be placed on the full Court's agenda for further guidance, particularly on controversial matters; but by far, most currently are handled by another Justice designated by the Chief Justice. As the number of motions and other administrative duties has increased steadily over the years, Chief Justices have increasingly delegated authority to an Administrative Justice to resolve most pre-merits motions. Likewise, the Clerk has limited authority to dispose of certain categories of motions pursuant to express guidelines set by the Court.

Whenever the Chief Justice is absent or unable to act, the role of Acting Chief Justice automatically falls upon the next most senior Justice who is available. Most commonly, the Dean of the Court¹⁴⁷ is the acting Chief Justice, but on occasion when the Chief and Dean are both absent, that duty descends to the most senior Justice available. The *Rules of Judicial Administration* also specify that the Dean of the Court automatically becomes acting Chief Justice if the sitting Chief leaves office for any reason; but in that event, the Court is also required to promptly elect a successor to serve the balance of the unexpired term.¹⁴⁸

144. See *Newmons*, 87 So. 2d at 50.

145. FLA. CONST. art. V, § 2(b).

146. FLA. R. JUD. ADMIN. 2.030(a)(2)(B)(ii).

147. The present Dean is Justice Charles T. Wells.

148. FLA. R. JUD. ADMIN. 2.030(a)(2)(A).

Each Chief Justice's term runs for a period of two years beginning and ending on July one of each successive even-numbered year.¹⁴⁹ Prior to the end of each two-year term, the Court must elect the Chief Justice who will serve during the next term. By a custom unbroken for three decades, the Court has elected as Chief Justice the next most senior Justice who has not yet held the office.¹⁵⁰ In the rare event that a time comes when all seven have served, the Court presumably would begin the rotation again, starting with the longest serving Justice.

One beneficial result of this rotation system is that it lessens the possibility that any particular Justice or group of Justices could gain indefinite control of the Court's executive functions. This is vastly different from the United States Supreme Court, where the Chief Justice of the United States is nominated by the President, subject to Senate confirmation, and is life tenured. The Supreme Court of Florida's customary rotation system creates a significant check and balance omitted from the constitution itself, which specifies only that the Court must choose a Chief Justice by majority vote.¹⁵¹ By honoring the rotation system, the Court also eliminates the discord that seems inherent in any competitive election system and could hamper the Court's collegiality, an essential component of any multi-member decision-making body.

F. *Role of the Other Justices*

The power of the Chief Justice, however, is not limitless. Very significant powers reside in the Court as a body, particularly through the fact that all judicial opinions and many major administrative concerns require assent by at least four Justices. Moreover, the Chief Justice alone cannot possibly supervise all of the various entities under the Court's control. The effect is that the Court in practice operates on a highly collegial basis, with all of the Justices assigned and involved in some aspect of administration.

One aspect of shared responsibility and collegiality is expressed most noticeably in the fact that each Justice is assigned a variety of supervisory duties. These include: oversight of the internal committees and offices that govern the Court; liaison responsibility with bar organizations and rules committee; and assignment to a variety of special commissions and committees created, from time to time, to address questions of public policy involv-

149. *Id.*

150. The custom actually predates the 1980s but was interrupted during the 1970s when some members of the Court were under investigation for alleged improprieties. The custom resumed in 1984 with the election of Justice Joseph A. Boyd, Jr.

151. FLA. CONST. art. V, § 2(b).

ing the courts. For example, members of the Court have chaired or supervised public commissions charged with reforming guardianship laws, investigating gender bias in Florida's judiciary, and examining ways to eliminate racial and ethnic bias from the judicial system. Each of these commissions ultimately produced extensive proposals for reform, most of which now have been implemented by the Governor, the legislature, and the courts.¹⁵² To this extent, members of the Court use their offices to help effect changes in public policy beneficial to the state and consistent with the sound administration of justice.

G. *Role of the Judicial Assistants, Law Clerks, & Interns*

Because the Justices' duties are so extensive, they could not possibly discharge their obligations without the help of staff. Each Justice accordingly is permitted to hire four staff members: a secretary (more commonly known as a judicial assistant in the state court system) and three law clerks. The Chief Justice, with far greater responsibilities, has a larger staff. The staff includes two additional Judicial Assistants, a Reporter of Decisions, the Director of Public Information, and an Inspector General, all of whom remain attached to the office through different administrations. Also reporting to the Chief Justice is the Director of Central Staff, who supervises a staff of six other attorneys and an additional judicial assistant. Central staff assists the entire Court by processing many routine kinds of cases and handling other projects as assigned by the Chief Justice. Finally, the staffs of the Justices are usually supplemented three times a year by an internship program that brings law students into the Court to act as research aides.

1. Judicial Assistants

In Florida's judiciary, Judicial Assistants are the persons responsible for the general administration and the flow of work in a judge's or Justice's office. Their duties are broad and vary from office to office, but almost always include supervising the flow of judicial activity, paperwork, keeping files, overseeing the Justices' schedules, interacting with other offices, and dealing with correspondence and telephone calls. Judicial Assistants also may help in the drafting of judicial opinions, especially in the preparation and editing of successive drafts. Members of the public who call individual Justices almost always deal with the Judicial Assistant first. Judicial Assistants are hired by and serve at the pleasure of their respective Justice.

152. *E.g.*, Tannen, *supra* note 79.

2. Law Clerks

As noted above, the duties of law clerks—now formally called Staff Attorneys—also vary among the offices, but they are usually responsible for conducting research and producing memoranda reflecting that research. Many also have the responsibility for the initial drafts of opinions for their Justices after receiving express instructions and guidance from the Justice. In this situation, law clerks typically are instructed on the result and analysis that should be used in the proposed opinion for the assigned Justice to review, revise, or edit.

Opinion writing is a responsibility that can be both time-consuming and labor-intensive.¹⁵³ Often, the most time-consuming task is creating the first draft, though this work is crucial in moving the opinion toward a form that can be circulated for review by the full Court. Few Justices would be able to manage their schedules unless at least some opinion drafting was done by their staffs. Members of the Court often choose law clerks not merely based on academic performance in law school but also on proven writing ability, often demonstrated in prior professional careers, law clerk experience at another court, or scholarly work completed in law school.¹⁵⁴ This professional writing ability is an absolute prerequisite to a legal position that requires not only constant and extensive research, but also the reduction of that research into a concise yet comprehensive memorandum. Of course, the writing of legal opinions can be very exacting, if only because impact opinions have on the law. Law clerks responsible for opinion drafting, thus, must be able to master a style of English that is not merely formal, but very precise as well.

Because of this heavy responsibility, it is somewhat paradoxical that the common public image of law clerks is of young people freshly graduated from law school, with no real experience,¹⁵⁵ who will leave to enter private practice after a year or two of clerking. While this may be the case in many instances, it should be noted that the Justices of the Supreme Court of Florida

153. As a result, law clerks, at a minimum, must have a law degree before the date they begin work. The Court previously required admission to The Florida Bar soon after law clerks began work, but this requirement was dropped as part of the job description in the mid-1980s. Justices, however, remain free to require Bar membership if they desire, and pay scales overwhelmingly favor those who have Bar membership. As a result, rarely are law clerks not members of The Florida Bar.

154. For example, past law clerks have included former journalists, former law professors, former Assistant Prosecutors, and former Appellate Public Defenders.

155. This perception is a reality for the United States Supreme Court. Most law clerks there serve only a one-year term.

throughout its history have often retained law clerks on a permanent basis.¹⁵⁶ These most often are attorneys whose skills and experience especially suit them for the tasks assigned, and who remain on staff indefinitely, at the pleasure of the Justice.

A number of factors have contributed to the movement to retain one or more permanent law clerks. Perhaps the most significant is that the administrative and public responsibilities of the Justices have so greatly increased in recent years that the need for quality legal support has increased dramatically. In essence, since no additional judicial resources are available to meet the increased responsibilities, Justices must rely on other legal professionals to help shoulder the work. The competence and experience of those professionals are at a premium.

3. Interns

Since 1993, the Court has dramatically altered its intern program. In 2001, it created the Supreme Court of Florida Internship Program for Distinguished Florida Law Students. This honors program is open to qualified law students from all accredited Florida law schools.¹⁵⁷ Previously, the Court accepted its interns in August and January only from students selected by the faculty of the Florida State University College of Law in Tallahassee and these students were in turn given academic credit for their work at the Court. Now all law schools in Florida are invited to send their best students to take part in the internship program during the fall, spring, and summer semesters. Usually students ranking in the top of their class are selected. Depending on the number selected for internship each semester, two interns are assigned to each office, the Clerk's office, and the Court's central staff of attorneys.

Internships starting in May and extending over the summer also are potentially available to students from any law school and may be more or less informal in nature.¹⁵⁸ These interns serve on a purely volunteer basis and are responsible for their own expenses. Academic credit is available only if the students make the necessary arrangements with their law schools.

156. Law clerks are not permanent in the sense of having a job with civil service-style protections. Rather, these law clerks, at the request of their Justices, agree to stay for some indefinite period beyond the two-year minimum commitment typically required by each Justice at the time the law clerk is hired.

157. On occasion similarly qualified students from out-of-state law schools are accepted.

158. An application is usually accomplished by the student sending in a cover letter, resume, and writing sample to a Justice at the Court, in late winter or early spring, prior to the summer in question. Standards for these internships vary from office to office, as do the number of interns that will be accepted. Some offices take only one intern, while others take two or three.

Job responsibilities of interns vary among the offices, but usually involve assisting the law clerks in preparing memoranda regarding the Court's determination of jurisdiction in discretionary review cases.¹⁵⁹ Many offices have a structured program in which student interns are given increasingly more responsibility as they demonstrate aptitude. Much of an intern's work, however, consists of more routine matters such as writing memoranda to the Justice on petitions for jurisdiction, photocopying research material identified by law clerks, and writing memoranda to the law clerks on legal issues that have been assigned by the supervising Justice. Interns in the Clerk's office provide assistance to the administrative Justice and do other special projects as directed by the clerk.

Perhaps the most valuable aspect of the Court's internship program is an insight into the Court's operation and an opportunity to work with a Justice of the state's highest tribunal. An internship coupled with a positive evaluation by a Justice or the Justice's staff can be a strong credential. Moreover, a very significant number of former interns have gone on to find jobs as law clerks at the Supreme Court of Florida or in other courts. Therefore, an internship can be an important stepping stone for a student interested in working as a law clerk after graduation. It is also a way in which the Court assists in educating succeeding generations of lawyers.

H. *Ethical Constraints on the Justices and Their Staffs*

The public, and even some members of the legal profession, do not fully appreciate the strict ethical constraints imposed upon judges and their staffs, including interns. The Clerk's office and the public information office frequently receive letters from people asking that particular cases be decided certain ways or that judges should correct some perceived oversight in a case. Members of the public are sometimes offended when queries of this type go unanswered. This occurred most notably during the 2000 presidential election appeals, in which the various staff offices throughout the building received thousands of phone calls and well over 100,000 emails and letters that essentially sought to "lobby" the Court in its decision-making process. However, the Court and its staff live under a very rigorous code of ethics that forbids them to consider such outside comments or to comment on pending matters.

159. See discussion *infra* Part VI.

1. Constraints on Justices

Perhaps the most common misunderstanding, especially among the lay public, is a widespread belief that judges or Justices can be approached about their official duties in much the same way a governor, a legislator, or their respective employees can. However, the United States and Florida Constitutions¹⁶⁰ and ethics codes¹⁶¹ absolutely require that judges be and appear to be impartial. For that reason, judges and Justices are not permitted to publicly discuss any aspect of pending or impending cases¹⁶² as well as cases that have become final¹⁶³ or are pending in other courts.¹⁶⁴

Impartiality and neutrality are, of course, the bedrock upon which all who come before the courts must rely. Judicial independence is predicated upon the assurance of this evenhandedness or level playing field. Partisanship is strictly prohibited. In an effort to maintain public confidence in the judiciary's impartiality, judges and Justices are required to maintain a broad detachment from political activity. For example, the Supreme Court of Florida has determined that a judge or Justice may be reprimanded for writing public endorsement letters of a candidate even in a nonpartisan judicial election.¹⁶⁵ This conclusion was based on an ethics rule generally prohibiting a judge or Justice from lending the prestige of the office to any political cause.¹⁶⁶ As a result, judges and Justices are required to refrain from participation in most types of political activities beyond those necessary for their own judicial elections.

Even the personal finances of judges and Justices are closely regulated. For example, they are not permitted to be involved in any business transactions that might reflect poorly on their impartiality or job performance.¹⁶⁷ They are required to divest themselves of investments that result in their frequent recusal in cases before the Court, such as where a judge or Justice owns stock in a corporation that is a frequent litigant.¹⁶⁸ Gifts, loans, and

160. U.S. CONST. amend. XIV; FLA. CONST. art. I, § 9.

161. FLA. CODE JUD. CONDUCT, Canons 2, 3.

162. *Id.* 3B(9).

163. These include, for example, the fact that matters were discussed at Court conference, the content of unpublished draft opinions, and the Court's initial vote or changes in votes prior to release of an opinion.

164. FLA. CODE JUD. CONDUCT, Canon 3B(9).

165. *See In re Glickstein*, 620 So. 2d 1000 (Fla. 1993); *see also In re Code of Judicial Conduct* (Canons 1, 2, & 7A(1)(b)), 603 So. 2d 494 (Fla. 1992).

166. FLA. CODE JUD. CONDUCT, Canon 7.

167. *Id.* 5D.

168. *Id.* 5D(4).

favors are closely regulated¹⁶⁹ and some restrictions even apply to the finances of a judge or Justice's family and household members.¹⁷⁰ Judges and Justices must also file disclosures of their income, assets, and business interests.¹⁷¹ A compendium of other ethical constraints imposed upon judges and Justices are set out in considerable detail in the *Code of Judicial Conduct*.

Enforcing ethical constraints on Justices of the Court poses a unique concern because, in theory, the Court is almost always the final arbiter of what is ethical and what is not.¹⁷² The Justices thus are the most highly visible examples for ethical conduct. As a result, the Florida Constitution has created special mechanisms to deal with any alleged impropriety by a Justice.¹⁷³ First, members of the Court are subject to inquiry by the Judicial Qualifications Commission ("JQC"), as are all Florida judges.¹⁷⁴ The JQC recommends proposed discipline for breaches of judicial ethics, subject to review by the Court. However, when a Justice of that court is being investigated, all sitting members of the Court are automatically recused. Thereafter, the seven most senior Chief Judges of Florida's twenty judicial circuits automatically sit as temporary Associate Justices¹⁷⁵ to review the case and to impose discipline if appropriate. Discipline can include reprimand, suspension, or removal from office.¹⁷⁶

Justices of the Court, like all judicial officers, are also subject to impeachment and to removal by the legislature. Grounds for impeachment include any misdemeanor in office as determined by a two-thirds vote of the Florida House of Representatives.¹⁷⁷ Once impeached, a Justice is automatically suspended and the Governor can appoint a temporary replacement until completion of the trial.¹⁷⁸ Trial after impeachment occurs before the Florida Senate, and the Justice being tried can be removed from office upon a two-thirds Senate vote. The Senate can also take the additional step of disqualifying the Justice from holding any future Florida office,¹⁷⁹ though this requires an affirmative act and is not an automatic consequence of removal.¹⁸⁰

169. *Id.* 5D(5).

170. *Id.*

171. FLA. CODE JUD. CONDUCT, Canon 6B(1).

172. The Court itself promulgates the ethics rules. *See* FLA. CONST. art. V, § 2(a).

173. *See* FLA. CONST. art. V, § 12.

174. FLA. CONST. art. V, § 12(a).

175. The significance of the term "Associate Justice" is discussed *infra* Part II.I.

176. FLA. CONST. art. V, § 12(a)(1).

177. FLA. CONST. art. III, § 17(a); *see also* *Forbes v. Earle*, 298 So. 2d 1, 5 (Fla. 1974).

178. FLA. CONST. art. III, § 17(b).

179. FLA. CONST. art. III, § 17(c).

180. *Smith v. Brantley*, 400 So. 2d 443, 450 (Fla. 1981).

The Florida Constitution specifies that the Chief Justice of the Supreme Court of Florida must preside or choose another Justice to preside over the Senate at all trials after impeachment.¹⁸¹ If the Chief Justice is the one under investigation, the Governor presides.¹⁸²

2. Constraints on Justices' Staffs

Judicial Assistants, law clerks, and court interns are subject to much the same ethical constraints imposed on Justices, at least with respect to official matters on which they work.¹⁸³ For their tenure on the staff, these persons are effectively a part of the Justice's official position when dealing with the Court's official business. As a result, they are retained subject to strict rules of confidentiality and to the canons of judicial ethics in a derivative sense, though the JQC obviously lacks jurisdiction over persons who are not judges. However, it deserves emphasis that this conclusion applies only to official matters and not to all activities of staff members outside the Court.

Prior to 1992, many persons assumed that judicial staff members were subject to all of the constraints imposed upon the Justices, even for matters conducted on personal time.¹⁸⁴ In May 1992, the Florida Committee on Standards of Conduct Governing Judges—now called the Judicial Ethics Advisory Committee—reinforced this interpretation in an advisory opinion concluding that judicial assistants were prohibited from engaging in partisan political activities, just as judges and Justices are.¹⁸⁵ The Committee's conclusions obviously implied that all judicial staff members were subject to the canons of judicial ethics as though they themselves were judges. This view, however, was rejected by the Supreme Court of Florida in a court conference in the fall of 1992. At that time, the Court took the unusual step of overruling¹⁸⁶ the advisory opinion and issuing its own statement on the question.

181. FLA. CONST. art. III, § 17(c).

182. *Id.*

183. FLA. CODE JUD. CONDUCT, Canon 3B(2).

184. See Scott D. Makar, *Judicial Staff and Ethical Conduct*, FLA. B.J., Nov. 1992, at 10.

185. See Comm. on Standards of Conduct Governing Judges Op. 92-33 (1992) (concerning FLA. CODE JUD. CONDUCT, Canon 7 (B)(1)(b) Judicial Assistant's Political Activity).

186. The Court has traditionally used a somewhat unusual method of commenting on advisory opinions of the Committee. This is something that, in any event, is rarely done. If a member of the Court disagrees with an advisory opinion, the matter may be discussed at a Court conference. If a majority of the Court agrees, a statement may be prepared commenting on the advisory opinion and that statement is then placed in the official minutes of the Court. At that time, the Clerk of the Court notifies the Committee Chair of the Court's action and transmits a copy of the relevant portion of the minutes to *The Florida Bar News* for publication. The act of commenting on an advisory opinion in this manner obviously does not consti-

This occurred after some of the judiciary's employees voiced objections to the Committee's reasoning.

In its statement, the Court found that judicial staff members have a First Amendment right to engage in political activities provided this is done outside of Court, on personal time, and without reference to the judge or the judge's office.¹⁸⁷ In support of this conclusion, the Court said that members of a judge's staff are analogous to the spouses of judges, who have a right to engage in political activities using their personal time and resources.¹⁸⁸ This reasoning implies that staff members may be treated the same as a judge's spouse in other contexts involving the use of free time, though the analogy obviously is not a perfect one¹⁸⁹ and could be less forceful outside the context of exercising free-speech rights.

A special variety of ethical problems may arise with respect to law clerks. Some law clerks decide to enter private practice after completing their work for the Court, and some firms have voiced confusion over the ethical standards that govern the process of hiring a law clerk. Obviously, a problem could develop if the hiring firm has a case pending before the Court. Thus, law clerks must disclose any possible conflict of interest to their Justices.¹⁹⁰ To assist in proper disclosure to the Justice, a law firm should disclose to the law clerk any of its cases pending for review in the Court or that are likely to be pending, while employment negotiations are pending.¹⁹¹ At that time, the law clerk is bound to discuss the matter with the Justice and avoid contact with the disclosed cases.¹⁹² The law clerk may be segregated from these cases even after negotiations end or fail if the Justice deems it necessary.¹⁹³

Upon leaving the Court, former law clerks may not work on any case which was pending at the Court while they were employed at the Court, provided they participated personally and substantially in the case.¹⁹⁴ This last

tute a decision of the Court and, for that reason, is not absolutely binding, although highly persuasive.

187. Supreme Court of Florida Conference, minutes of meeting (Sept. 8, 1992) (on file with Clerk).

188. *Id.*

189. It is unlikely, for example, that the financial activities of a judge or Justice's judicial assistant would create a substantial conflict of interest. The financial activities of the judge or Justice's spouse could.

190. R. REGULATING FLA. BAR 4-1.12(b).

191. This should include any case in which the firm has an interest in its own right or as counsel to a party.

192. R. REGULATING FLA. BAR 4-1.12(b).

193. *Id.*

194. FLA. R. JUD. ADMIN. 2.060(b).

proviso was expressly adopted by the Court in 2003 to remove ambiguities from the previous rules and to ensure that Florida's Supreme Court law clerks—who often gain substantial knowledge about death penalty law in their jobs—would not be disqualified from every death case pending during their tenure at the Court.¹⁹⁵ The Court noted that it did not want to further limit the pool of qualified capital appeals lawyers.¹⁹⁶ Because some law clerks work for the Court for many years before entering practice, they virtually would be disqualified in every single capital case if a stricter rule applied.

The *Rules Regulating The Florida Bar* requires that law clerks who go on to work for law firms must be segregated from working on any case involving matters in which the law clerk participated personally and substantially, except upon consent by all parties after disclosure.¹⁹⁷ A problem of this type might occur, for example, where the firm, after hiring the law clerk, acquires a client who had a case pending in the Court. Moreover, law clerks are generally ethically restricted in discussing information learned at the Court, including the nature of their work assignments.

Similar restrictions apply as to Judicial Assistants and interns, though problems are less frequent in this regard. Judicial Assistants are fewer in number and do not leave their positions with the Court as frequently as law clerks. Interns, meanwhile, are present at the Court for a few months at most and seldom are exposed to any but the most routine matters. However, both Judicial Assistants and interns must adhere to the rules of ethics and confidentiality applicable to law clerks.

Enforcement of ethical constraints imposed on judicial staff differs from that used in the case of Justices and judges. Ethical violations of a less serious nature typically are handled by the Justice as a personal issue and can include reprimand or termination of employment. Serious violations also can result in contempt proceedings being brought, though only one such incident has occurred in the last few decades.¹⁹⁸ Any staff member who is an attorney is also subject to professional discipline by The Florida Bar, with penalties ranging from a private reprimand to disbarment. Student interns who plan to become licensed attorneys can be investigated for ethical breaches by The Florida Board of Bar Examiners, possibly resulting in a denial of licensure.¹⁹⁹

195. Amendments to the Fla. Rules of Judicial Admin. (2-Year Cycle), 851 So. 2d 698, 699–700 (Fla. 2003).

196. *Id.*

197. R. REGULATING FLA. BAR 4-1.12(a).

198. *In re Schwartz*, 298 So. 2d 355 (Fla. 1974).

199. The Florida Board of Bar Examiners routinely sends detailed questionnaires regarding former interns to the Justices and their staffs. The questions probe such matters as the

I. Court Protocol

In its day-to-day operations, the Supreme Court of Florida has followed a simple protocol that borders on the informal. The unifying factor of the protocol, and perhaps its most formal aspect, is a seniority system in which more senior Justices outrank their colleagues for certain procedural and formal purposes, with the sitting Chief Justice always deemed most senior. If more than one Justice is appointed to the Court simultaneously, seniority is determined by reference to the appointee's prior career using a standard adopted in 1968.²⁰⁰ Virtually every other aspect of procedure in the Florida Supreme Court building is governed by this seniority ranking.

Justices are listed according to seniority in court stationery, choose their office suites in the same order, and appear formally in public ranked from most senior to most junior. When the Court is in session the Justices are seated with the Chief Justice presiding in the center, the next most senior Justice placed to the immediate right, the next most senior Justice placed to the immediate left, and so on until all are seated. Even the separate opinions attached to a majority opinion are ranked by reference to seniority.²⁰¹

The seniority system also expresses itself in other ways. For example, a listing of Justices in a publication should adhere to the system. However, formal public introductions reverse the seniority ranking on the premise that

intern's thoroughness, promptness, work ethic, background, and personal problems. If the answer to any question raises a concern about fitness to practice law, the bar examiners will investigate further.

200. See The Fla. Supreme Court, minutes of meeting (Jan. 12, 1987) (on file with the Court). On October 14, 1968, the Supreme Court of Florida adopted the following resolution:

BE IT RESOLVED:

Seniority on this Court shall be determined by length of continuous service on this Court:

In the event more than one Justice assumes office on this Court at the same time, seniority of such Justices shall be determined in the following manner:

1. Former Justices of this Court;
2. Judges or former Judges of the District Courts of Appeal. Seniority of such District Court Judges shall be based upon the length of continuous service;
3. Judges or former Judges of the Circuit Court. Seniority of such Circuit Court Judges shall be based upon the length of continuous service;
4. Judges or former Judges of other courts of record of this State. Seniority of such Judges shall be based upon the length of continuous service;
5. Lawyer[s] without former judicial experience. Seniority of such lawyers shall be determined by length of time they have been admitted to The Florida Bar.

This Resolution shall become effective immediately.

Id. This policy was reaffirmed on January 12, 1987, when two Justices—Stephen Grimes and Gerald Kogan—assumed office simultaneously. Because Justice Grimes had served on a district court, he was accorded a higher seniority than Justice Kogan, who had served on a circuit court.

201. As a general rule, separate opinions are divided into the six separate categories and, within each category, are then ranked according to the author's seniority.

the most senior Justices should be introduced last, giving them the “last word.”²⁰²

Formal modes of addressing Justices in writing have varied over time. However, in 1992, at the request of Allen Morris,²⁰³ and through Justice Parker Lee McDonald, the Court established a few guidelines. The Court concluded that it would be appropriate in addressing correspondence to refer to the Chief Justice as “The Honorable (name), Chief Justice, Florida Supreme Court.”²⁰⁴ By analogy, letters addressed to other Justices would be the same, but with the word “chief” omitted. The most common introductory salutation in a letter is “Dear Chief Justice (name)” or “Dear Justice (name).”

A member of the Court should not formally be called “Judge (name).” In the Florida judiciary, the title “Justice” is given exclusively to members of the Court²⁰⁵ because the Florida Constitution clearly distinguishes “Justices” from “judges” sitting on the state’s lower tribunals.²⁰⁶ Contrary to the practice in the United States Supreme Court, the term “Associate Justice” is not a proper title for any sitting member of the Supreme Court of Florida. The term is not used in the constitution. “Associate Justice” is the customary temporary title given to judges of a lower court assigned for temporary service on the Court.²⁰⁷ Thus, the title should not be used in any context except when a judge is temporarily assigned to the Court.

In less formal situations, or when addressing a Justice verbally, the members of the Court usually are called simply “Justice (name).” For example, this has become the standard method of addressing a member of the Court during oral argument. In the late 1980s, the Court completely abandoned the use of the gender-specific titles “Madam Justice (name)” or “Mister Justice (name).”²⁰⁸

202. ALLEN MORRIS, PRACTICAL PROTOCOL FOR FLORIDIANS 77 (rev. 4th ed. 1988).

203. Clerk-Emeritus/Historian, Florida House of Representatives.

204. Letter from Justice Parker Lee McDonald, Supreme Court of Florida to Allen Morris, Clerk-Emeritus/Historian, Florida House of Representatives (Nov. 2, 1992) (on file with author).

205. *Id.*

206. See FLA. CONST. art. V.

207. FLA. R. JUD. ADMIN. 2.030(g). Temporary assignments are made, for example, when a quorum of the Court is not available. *Id.* 2.030(a)(4)(A).

208. This change dates from the appointment of Rosemary Barkett, who was the first woman Justice appointed to the Supreme Court of Florida. Shortly after her appointment in 1985, Justice Barkett indicated she would not use the title “Madam Justice Barkett” but simply “Justice Barkett.” Later, the other members of the Court dropped the “Mister” from their titles, and this change was formalized by altering all name plates on the Justices’ suites in the Florida Supreme Court Building. The use of the unadorned title “Justice” is consistent with the court’s policy of avoiding gender-specific language wherever possible. However, some attorneys still use these gender-specific titles without incident. See Ricki Lewis Tannen,

Justices who have retired from the Court commonly are addressed by the courtesy title "Justice," though this is not required and is subject to some ethical constraints. The courtesy title should not be used during the practice of law in which a former Justice may be engaged except for purely biographical purposes. Nor should the title be used in any other context in which the title may create a false impression. The title "Chief Justice" can be used only with respect to a sitting Chief Justice of the Supreme Court of Florida and is never used as a courtesy title.²⁰⁹

A few other matters of court protocol have been distilled into written form by Allen Morris, including details of the investiture ceremony for new Justices²¹⁰ and protocol for funeral ceremonies of Justices.²¹¹ By tradition, the Court also has generally adhered to these two protocols with some exceptions. In the case of investitures, for example, the exact details of the program are left to the new Justice. In the case of funeral ceremonies, the wishes of the family will be honored even if they wish to depart from the protocol. For example, deceased Justices by longstanding custom are permitted to lie in state in the Supreme Court Building rotunda with a Florida Highway Patrol Honor Guard assisting. In recent years, some families have foregone the lying in state. In 2004, with the passing of retired Justice Richard W. Ervin, the Court also returned to another tradition from earlier years: it convened a full ceremonial session in remembrance of the Justice's life and achievements several weeks after his death. The full text of this ceremony was scheduled to be published in West Publishing Company's Southern Second series, a tradition still in use in many of the state's lower courts. Finally, the Court also lowers its flags to half-staff upon the death of any present or former Justice.

J. *The Clerk's Office*

The vast majority of the Supreme Court of Florida's contact with lawyers and the public occurs through the Office of the Clerk of the Court.²¹² Briefs are filed through the clerk, and virtually all routine communications with lawyers are handled by this office. Yet, the clerk's staff does far more

Report of the Florida Supreme Court Gender Bias Study Commission, 42 FLA. L. REV. 803 (1990).

209. Letter from Justice Parker Lee McDonald, Supreme Court of Florida to Allen Morris, Clerk-Emeritus/Historian, Florida House of Representatives (Nov. 2, 1992) (on file with author).

210. MORRIS, *supra* note 202, at 122-24.

211. *Id.* at 113-14.

212. The present clerk is Thomas D. Hall, and the Chief Deputy Clerk is Debbie Causseaux.

than just deal with the public. The Clerk, who serves at the pleasure of the Court,²¹³ is charged with the responsibility of maintaining all papers, records, files, and the official seal of the Court. Moreover, the Clerk's staff maintains the Court's docket, oversees the rigorous procedural requirements imposed on death penalty cases, arranges the exact timing of oral argument, issues certificates of good standing for attorneys, certifies law students for practice pursuant to chapter eleven of the *Rules Regulating the Florida Bar*²¹⁴ and prepares finalized opinions for release to the public. Orchestrating routine functions such as these requires considerable coordination among the lawyers, the parties, and the Court. All such matters are handled by the Clerk's office,²¹⁵ and the workload is substantial and steadily increasing. In 1992, the Clerk's office filed dispositions in 1890 cases and opened files in 1844 new cases, in addition to handling 314 motions for rehearing. In 2003, by contrast, the Clerk's office filed dispositions in 2295 cases and opened files in 2486 new cases, in addition to handling 245 motions for rehearing.

K. *The Library of the Supreme Court of Florida*

For its entire history, the Court has maintained its own law library, which consequently is Florida's oldest state supported library in continuous operation. An 1845 catalog in the library's possession still lists the 260 volumes that comprised the Court's first collection in the year Florida was granted statehood. By mid-2004, the library maintained around 117,908 volumes along with some 12,417 monograph titles, 1497 serial titles, and hundreds of linear feet of archival and manuscript material.²¹⁶

But the library has not lost touch with its considerable history. A number of rare Florida legal books are in the Court's collection, including Spanish texts that were of great importance in the years after the Spanish Crown ceded Florida to the United States.²¹⁷ The library also still retains and uses a large number of antique glass-front "barrister" book cases that have belonged to the Court since they were first purchased in 1913. These Globe-Wernicke sectional bookcases filled five railroad cars when originally delivered,

213. FLA. CONST. art. V, § 3(c).

214. R. REGULATING FLA. BAR 11.1.4.

215. Current clerk's office staff assignments are listed at <http://www.floridasupremecourt.org/clerk/index.shtml>.

216. Some of the information used here was compiled by former Supreme Court Librarian Brian Polley.

217. The treaty ceding Florida bound both the United States and the future state government to honor matters already finalized under Spanish law. *Apalachicola Land & Dev. Co. v. McRae*, 98 So. 505, 524–25 (Fla. 1923). Thus, a large number of early court cases actually rested on an interpretation of Spanish law.

prompting a proud headline in the October 3, 1913 edition of a Tallahassee newspaper, *The Weekly True Democrat*.²¹⁸

The Office of the Court Librarian²¹⁹ has existed only since 1957, and the occupant serves at the pleasure of the Court. The current librarian also has been designated as the official court archivist and historian by the Chief Justice. Beginning in 1862, the Clerk also wore the hat of “head” librarian, though from 1899 until 1957, a full-time assistant librarian was employed. The library is open to the public, but it does not circulate books. Its hours of operation are 8:00 a.m. to 5:00 p.m., Monday through Friday, except holidays, although the stacks are available to Court Justices and staff at any time.

L. *The Office of the State Courts Administrator*

The Office of the State Courts Administrator was created on July 1, 1972, when the state courts were constitutionally unified under the administrative control of the Supreme Court. It is also located in the Supreme Court Building. Its initial purpose was to assist the Chief Justice and the Court with technical and fiscal problems associated with preparing the operating budget of the judicial branch, as well as compiling statistics on the need for new judges and specialized court divisions throughout Florida. Today, the Office of the State Courts Administrator²²⁰ serves as the overall administrative office, overseeing the operations of the entire justice system, including all of the trial and appellate courts and the state’s judicial education system. It also serves as the Court’s liaison to a number of other agencies, including the legislature, the Governor, auxiliary court agencies, and national judicial agencies. Under the supervision of the Chief Justice, the office oversees a variety of legal programs, information systems used by the courts, and the judicial branch’s accounting and fiscal activities.

M. *The Marshal*

The Court also appoints a marshal to be the custodian of the Supreme Court building and grounds and to be the conservator of the peace in the building or any place where the Court is sitting. The Marshal is also authorized to execute the process of the Court throughout Florida. To this end, the marshal is vested with constitutional authority to deputize the sheriff or a

218. See *Five Carloads of Book Cases for Tallahassee*, THE WEEKLY TRUE DEMOCRAT, Oct. 3, 1913.

219. The present librarian is Joan Cannon.

220. The present State Courts Administrator is Elisabeth Goodner, and the Deputy State Courts Administrator is Blan Teagle.

deputy sheriff in any Florida county.²²¹ The Marshal also is responsible for performing some court budgeting, purchasing and contracting, security, and property accountability and maintenance. Traditionally, the marshal also calls the courtroom to order whenever the Justices enter to sit at any official session. This call to order, often called the “oyez,” is: “Hear ye, hear ye, hear ye, the Supreme Court of the great state of Florida is now in session. All who have cause to plea, draw near, give attention, and you shall be heard. God save these United States, the great state of Florida, and this honorable court.”²²²

III. AN OVERVIEW OF JURISDICTION

Of course, the most important aspect of the Supreme Court of Florida’s day-to-day operations is the exercise of its jurisdiction as the state’s highest court.²²³ It is through the exercise of jurisdiction that the Court chooses the cases that it will hear and the issues that will be decided. Florida’s society is shaped by these decisions because the opinions that result from the exercise of jurisdiction become a part of Florida law and create the precedent that will control future cases. Moreover, the bulk of the Court’s jurisdiction is discretionary, meaning that the Court may decline to hear cases falling into particular categories even if it has jurisdiction over them.²²⁴ Accordingly, the Court has significant power to choose the issues it deems to be the most important. Jurisdiction in discretionary cases, for example, usually is put to a vote by a panel of five Justices, with four votes being necessary to grant review.²²⁵ If the vote of the five Justices is three-to-two, the case is then sent to the remaining Justices.²²⁶ In all such cases a majority of Justices is necessary for the Court’s exercise of its discretionary jurisdiction.²²⁷

221. See FLA. CONST. art. V, § 3(c).

222. E.g., *Text of the Florida Supreme Court Hearing on the Presidential Election Case*, ST. PETE. TIMES, Dec. 7, 2000, available at http://www.sptimes.com/News/120700/Election2000/Text_of_the_Florida_S.shtml (last visited Mar. 20, 2005).

223. The historical development of the Court’s jurisdiction is amply discussed elsewhere. E.g., Arthur J. England, Jr. & Richard C. Williams, Jr., *Florida Appellate Reform One Year Later*, 9 FLA. ST. U. L. REV. 221 (1981) [hereinafter *Appellate Reform*]; *Constitutional Jurisdiction*, *supra* note 3.

224. See FLA. CONST. art. V, § 3(b)(3)-(6).

225. FLA. SUP. CT. MANUAL OF INTERNAL OPERATING PROCEDURES § 2(A)(1)(a), available at http://www.floridasupremecourt.org/pub_info/documents/IOPs.pdf (last visited Mar. 20, 2005). [hereinafter *MANUAL OF INTERNAL OPERATING PROCEDURES*]. If review is granted, but four Justices do not agree on the need for oral argument, the Chief Justice decides the issue or places the matter on the court conference agenda for resolution. *Id.*

226. *Id.*

227. *Id.*

A. *The Nature of Jurisdiction*

Jurisdiction always involves a deceptively simple question: does the Court have the power to hear and to determine the case?²²⁸ In discretionary cases, a second question must also be addressed: why should the case be heard?²²⁹ Most of the time, the answers are obvious. But there are a significant number of cases that fall somewhere at the limits of the Court's jurisdiction. These can be exceedingly complicated, and opinions addressing them often take on the quality of philosophical abstraction. Yet such cases may be highly important in the law because they draw the line between what the Court will and will not hear. Much of the discussion below involves such cases, and for that reason, the remainder of this article will be of primary interest to lawyers and persons who may ask the Supreme Court of Florida to hear their cases.

To further complicate the issue, the Court's jurisdiction is not based upon a single unified concept. Rather, jurisdiction falls into five distinct categories, each of which involves different concerns. These categories are: advisory opinions, mandatory appellate jurisdiction, discretionary review jurisdiction, discretionary original jurisdiction, and exclusive jurisdiction.²³⁰ Each of these categories is addressed in detail below.

The basis of the Court's jurisdiction is not entirely uniform, but rather, can vary among the categories. The variations are too numerous to include in anything less than a treatise. However, the most important include: 1) the presumptions circumscribing the Court's jurisdiction; 2) the precedential value of decisions and opinions within each category; and 3) the limits placed on the Court's discretion.

1. Presumptions

The presumptions circumscribing jurisdiction usually depend on the question of whether the Court's jurisdiction is limited or plenary. The Supreme Court of Florida is a tribunal of limited jurisdiction.²³¹ This means that the Court is forbidden to exercise any form of jurisdiction not expressly

228. See *State ex rel. Campbell v. Chapman*, 1 So. 2d 278, 281 (Fla. 1941).

229. See generally *Fla. Star v. B.J.F.*, 530 So. 2d 286 (Fla. 1988) (holding that the Court has subject matter jurisdiction over appeal of decision of intermediate appellate court expressly citing a statute).

230. See FLA. CONST. art. V, § 3(b).

231. See generally *Mystan Marine, Inc. v. Harrington*, 339 So. 2d 200 (Fla. 1976) (holding that the Court has limited review); *Lake v. Lake*, 103 So. 2d 639 (Fla. 1958) (holding that the Court cannot go beyond its limited powers).

provided in the Florida Constitution.²³² Unlike the circuit courts, the Supreme Court of Florida does not have a general grant of plenary jurisdiction,²³³ a grant that would give the Court authority over any matter not expressly excluded from its jurisdiction.

This is an important distinction and one of the most misunderstood aspects of the operation of the Court. The public, and indeed attorneys, often cannot understand why the state's highest court cannot correct every perceived wrong that has occurred in the lower courts. It also is the reason why virtually every well written opinion issued by the Court begins with a statement referencing the basis of jurisdiction. The Supreme Court of Florida cannot act without an express basis in the constitution authorizing jurisdiction. On the other hand, the circuit court is presumed to have jurisdiction unless the constitution or statutes say otherwise.²³⁴ Put another way, the jurisdiction of the Court, being limited, tends to be strictly construed, while the jurisdiction of the circuit courts, being plenary, tends to be liberally construed.

Thus, in close cases, the presumptions would disfavor jurisdiction in a court of limited jurisdiction while favoring jurisdiction in a court of plenary jurisdiction. This has an important consequence. When parties invoke the jurisdiction of the Supreme Court of Florida, they usually are fighting against a presumption that the Court cannot hear the case, and they carry a heavy burden to demonstrate jurisdiction.

However, these limitations are not entirely uniform. The Court's authority may verge on being plenary, at least within the context of certain types of cases. For example, the Court has mandatory exclusive appellate jurisdiction over a final judgment imposing a sentence of death.²³⁵ As a result, once the Court finds that a case involves the death penalty, the Court, as a practical matter, probably has a form of plenary jurisdiction in that case and the presumption would favor taking the case, even if there is some doubt remaining.²³⁶ This is particularly true in light of the Court's "all writs" jurisdiction, discussed more fully below.²³⁷

232. See *Harrington*, 339 So. 2d at 201.

233. Compare FLA. CONST. art. V, § 3(b) with FLA. CONST. art. V, § 5(b).

234. See *id.* at § 5(b).

235. *Id.* at § 3(b)(1).

236. See *Tillman v. State*, 591 So. 2d 167, 169 (Fla. 1991).

237. See discussion *infra* Part VII.E.

2. Precedential Value

Another factor that varies among the five categories is the precedential value of cases. Some types of opinions issued by the Court may lack the dignity accorded to others. This is especially true of advisory opinions, which, though they may be persuasive, do not establish controlling precedent.²³⁸ Opinions issued pursuant to the Court's exclusive jurisdiction also may lack the binding effect of precedent, but only to the extent that they deal with the Court's administrative and rule making functions. The Supreme Court of Florida's exclusive jurisdiction to regulate the bench and the bar is somewhat different. Court opinions disciplining judges and lawyers for improprieties may establish a kind of precedent, while in practice, such cases may be so fact-bound that the precedent is limited.

3. Discretion

Two categories of discretionary jurisdiction, discretionary review jurisdiction and discretionary original jurisdiction, involve a separate problem: the concept and use of "discretion"²³⁹ in deciding to hear the case. Discretion implies broad authority to choose, but the term has a somewhat different meaning in the present context. In *Florida Star v. B.J.F.*,²⁴⁰ the Court noted that even when a form of discretionary jurisdiction is established, the discretion of the Court to act is not always boundless.²⁴¹ Discretion itself can be limited by the existing policy and applicable law restricting the Court's actions even though technical jurisdiction might exist.²⁴² In other words, when the Court's authority to act is discretionary, it can establish by its own case law rules governing the exercise of the discretion.

Restrictions on discretion may be most obvious when the Court's discretionary original jurisdiction is invoked seeking one of the so-called "extraordinary writs." The mere request for mandamus, for example, vests the Court with jurisdiction. However, well established law severely restricts the Court's actual exercise of discretion to issue writs of mandamus²⁴³ and other extraordinary writs. Similar restrictions apply when the Court is asked to

238. *E.g.*, Fla. League of Cities v. Smith, 607 So. 2d 397, 399 n.3 (Fla. 1992).

239. Discretion can be involved to a lesser extent in other categories of jurisdiction, but the restriction usually is so obvious as to merit little discussion. For example, the Court has no discretion to refuse to hear a proper appeal pursuant to its mandatory jurisdiction. *See* FLA. CONST. art. V, § 3(b)(1)–(2).

240. 530 So. 2d 286 (Fla. 1988).

241. *Id.* at 288.

242. *Id.*

243. *See* discussion *infra* Part VII.A.

review an appellate decision that allegedly conflicts with a decision of another appellate court.²⁴⁴

As a practical matter, a determination of a lack of jurisdiction or lack of discretion results in the same outcome, the case is not heard by the Court. The distinction usually does not matter. However, there is at least one important consequence that justifies the distinction. In some cases, the deadline by which appeals must be taken to the United States Supreme Court hinges on whether the Supreme Court actually had jurisdiction of a case in which it has denied review. If the Court had jurisdiction but did not exercise discretion, then the time to take the further appeal is judged from the date the petition was dismissed or denied by the Court.²⁴⁵ But, if the Supreme Court lacks jurisdiction, then the time to seek review in the higher court is judged from the date the lower court's opinion became final.²⁴⁶ This is crucial for litigants seeking an appeal to the United States Supreme Court. Thus, lawyers and litigants who hope to preserve all avenues of appeal must be mindful of the distinction between jurisdiction and discretion.

Finally, of course, even when discretion is not limited by the law, the Court still can refuse to exercise its discretion to hear any case falling within a discretionary category.²⁴⁷ Typically, this may occur if the Court determines that the case does not present a significant issue or the result was essentially correct. For this reason, jurisdictional briefs in discretionary cases should always demonstrate that the case is significant enough to be heard. It is not enough to establish that jurisdiction exists and that discretion is unrestricted for present purposes, except in the rare case perhaps where the importance is obvious.

B. *Invoking the Court's Jurisdiction*

The jurisdiction of the Supreme Court of Florida usually must be invoked by an affirmative act of one of the parties to the cause. This can occur in several ways. In the advisory opinion category, jurisdiction is invoked by the Governor or Attorney General by the mere filing of a letter with the

244. See discussion *infra* Part VI.D.

245. See *Fla. Star*, 530 So. 2d at 289.

246. *Id.* This problem sometimes has been addressed by saying that a court has "jurisdiction to determine jurisdiction." However, the Supreme Court of Florida has avoided this type of analysis, which does not really solve the problem. If a court merely has jurisdiction to determine jurisdiction, then the decision not to hear a case could be construed as retroactively depriving the court of actual jurisdiction over the controversy. This would create a "Catch-22" for lawyers who hope to appeal their cases to the United States Supreme Court.

247. See FLA. CONST. art. V, § 3(b)(3)–(6).

Court, outlining the issues.²⁴⁸ In the mandatory appellate jurisdiction category, the Court's jurisdiction is automatic in death penalty appeals.²⁴⁹ The Court's jurisdiction is invoked by notice of appeal²⁵⁰ and petition in the other subcategories. Discretionary review jurisdiction is invoked by filing a notice of appeal to invoke discretionary jurisdiction and is followed by jurisdictional briefs. However, in some types of cases, briefing on jurisdiction is skipped and the case proceeds directly to merit briefing.²⁵¹ In the discretionary original jurisdiction category, review is sought by petition. Finally, the Court's exclusive original jurisdiction can be invoked by petition,²⁵² and in the case of the decennial review of legislative apportionment, the Attorney General must file the petition.²⁵³

By far, the largest single category of petitions for review are based on the assertion that jurisdiction exists because the decision under review conflicts with an opinion of another Florida appellate court. This category is discussed in greater detail below.²⁵⁴

IV. ADVISORY OPINIONS

Any discussion of advisory opinions usually begins with the observation that they are disfavored.²⁵⁵ This principle hinges on the nature of advisory opinions. As a broad rule, an advisory opinion is any conclusion of law stated by a court in the absence of an actual controversy.²⁵⁶ The reasons are obvious; courts exist to resolve real disputes, not to address abstract questions. Thus, the rule prohibits parties from bringing spurious lawsuits in order to create precedent. The rule equally forbids judges to establish law irrelevant to the matters at hand.²⁵⁷

However, the rule is subject to exceptions, partly because some controversies do not fall into the neat categories the rule might suggest. Reason-

248. See FLA. CONST. art. V, § 3(b)(10); FLA. CONST. art. IV, § 10.

249. FLA. CONST. art. V, § 3(b)(1).

250. Technically, since review is mandatory after the death sentence is imposed, no notice is actually required. However, because filing the notice triggers various time periods under the *Rules of Appellate Procedure*, a notice is almost always filed and, if not, the Court enters an order advising the parties what it deems to have been a notice.

251. See discussion *infra* Part VI.

252. The Court also may exercise its exclusive original jurisdiction over rule making and regulation of The Florida Bar on its own motion, but this is not done often.

253. FLA. CONST. art. IV, § 10.

254. See discussion *infra* Part VI.D.

255. See, e.g., *Interlachen Lakes Estates, Inc. v. Brooks*, 341 So. 2d 993, 995 (Fla. 1976); *Dep't of Admin. v. Home*, 325 So. 2d 405 (Fla. 1976).

256. See *Interlachen Lakes Estates*, 341 So. 2d at 995.

257. See *id.*

able people often differ over the true scope of legal controversies. Moreover, judicial opinions must be conveyed through the inherently inexact medium of human language, and sometimes it is useful for judges to comment on trends in developing case law and give guidance on ambiguous or unresolved questions of law.

There is established precedent, for example, for judges to write what often are called “scholarly” opinions creating an in-depth analytic framework to resolve particular issues. Opinions of this type almost always go beyond the bare analysis required to answer the specific question presented by the case, but rest on thorough research and reasoning contained in the text. As cases from the United States Supreme Court have demonstrated, they often are admired, honored, and addressed a wide range of issues.²⁵⁸ Thus, the rule against advisory opinions does not apply to scholarly analyses, though such opinions sometimes are criticized for their expansiveness.

Florida appellate opinions also have a long-standing tradition of containing obiter dicta, a phrase usually shortened to “dicta,” which by definition are statements in a court’s opinion that are extraneous or absolutely unnecessary to the resolution of the issues.²⁵⁹ Scholarly opinions, almost by definition, are often built on dicta. Moreover, dicta are so common in opinions that a well-established body of cases govern their interpretation, and obviously, tolerate their continued use. Thus, dicta are extraneous statements of law that are permissible, though not always taken as seriously as the holding in a case. Here again, the rule against advisory opinions does not reach so far as to prohibit the use of dicta where it is deemed necessary to help support the resolution of the issue being decided.

In any event, dicta are subject to strong limitations. Courts sometimes say that dicta binds no one, not even the ones who wrote them,²⁶⁰ though this assertion may be unreliable in many instances. In actual practice, dicta can have persuasive force in much the same way that a concurring opinion can, depending on the circumstances.²⁶¹ This is most apparent in scholarly opinions. In other words, dicta should be considered if relevant, can be ignored if poorly reasoned or distinguishable, and gain greater force with repetition.

Whatever border separates dicta from advisory opinions has never been finely drawn, and there probably can be no bright line rule. Clearly, dicta can verge into an advisory opinion and thus, may be abused. In broad terms

258. *E.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

259. *See Therrell v. Reilly*, 151 So. 305, 306 (Fla. 1932).

260. *E.g.*, *Hart v. Stribling*, 6 So. 455, 456 (Fla. 1889).

261. *See Milligan v. State*, 177 So. 2d 75, 76 (Fla. 2d Dist. Ct. App. 1965). *But see* *Cont’l Assurance Co. v. Carroll*, 485 So. 2d 406, 408 (Fla. 1986) (stating dicta is never regarded as “ground-breaking precedent”).

however, statements that illuminate or place in context any relevant issue have long been considered acceptable as a useful feature of opinion writing, especially in forecasting the law's evolution. The rule against advisory opinions would be most applicable to attempts to address wholly irrelevant issues.

Even then, other long standing exceptions to the rule against advisory opinions exist. In a few instances, even moot or completely abstract questions can be answered by the Court. For example, the mootness doctrine generally requires dismissal of a cause in which the issues have been resolved so fully that any decision would have no actual effect.²⁶² There is, however, an important exception for moot cases that present important questions capable of repetition yet likely to evade review. If the Court finds this situation to exist, jurisdiction may be determined as though the controversy had never become moot.²⁶³

Likewise, the Florida Constitution itself expressly authorizes the Court to consider questions of law and issue advisory opinions to the Governor and Attorney General in two narrow circumstances.²⁶⁴ Like all advisory opinions, these opinions may not constitute binding precedent, though they can be persuasive.²⁶⁵ They are authorized by the constitution to deal with situations in which the Court's opinion on a legal question can advance the public interest, discussed below.

A. *Advisory Opinions Requested by the Governor*

The Supreme Court of Florida may issue advisory opinions to the Governor on any question affecting the Governor's constitutional powers and duties.²⁶⁶ By tradition, the question or questions are posed in a simple letter to the Court from the Governor.²⁶⁷ Often, the letter is quite detailed and may include an in-depth briefing on the relevant law, including reasons why the Governor believes the questions should be answered in a particular way.

Here, jurisdiction is mandatory; the Court must hear the case and issue an opinion.²⁶⁸ Upon receipt of the Governor's request, the Clerk's office creates a case file and the letter is immediately routed to the Chief Justice,

262. *Hollywood, Inc. v. Clark*, 15 So. 2d 175, 181 (Fla. 1943).

263. *In re T.A.C.P.*, 609 So. 2d 588, 589 n.2 (Fla. 1992) (citing *Holly v. Auld*, 450 So. 2d 217 (Fla. 1984)).

264. FLA. CONST. art. IV, §§ 1(c), 10.

265. *See Fla. League of Cities v. Smith*, 607 So. 2d 397, 399 (Fla. 1992).

266. *See* FLA. CONST. art. IV, § 1(c).

267. This is consistent with the applicable rule which only requires that the Governor's request be in writing. *See* FLA. R. APP. P. 9.500(a).

268. *Id.*; *see* FLA. CONST. art. IV, § 1(c).

who will call a court conference to determine if the question can be answered and if oral argument is desired.²⁶⁹ If the case is accepted, the Chief Justice may keep the case or assign it to another Justice.²⁷⁰ Oral argument is usually granted,²⁷¹ except where at least four Justices determine that the question is not subject to answer for reasons discussed below.²⁷² Any person whose substantial interest may be affected by the advisory opinion also may be permitted to participate.²⁷³ Time limitations on briefing and scheduling of argument lie within the Court's discretion.²⁷⁴

An opinion is then issued on an expedited basis, subject to one exception—the constitution provides that the opinion must be rendered “not earlier than ten days from the filing and docketing of the request, unless in [the Court’s] judgment the delay would cause public injury.”²⁷⁵ The opinion is written in the form of a letter addressed to the Governor and signed by the concurring Justices. The letter is then published like any other court opinion. Any concurring or dissenting views are written in separate statements to the Governor signed by the Justices agreeing with that particular viewpoint, and are appended to the majority’s letter.

Under the constitution’s requirements, in the strictest sense, the Court’s discretion to answer a request for an advisory opinion is confined solely to questions of the Governor’s constitutional powers.²⁷⁶ If the questions are determined to be beyond constitutional concern, then the Court lacks discretion and must refuse to answer.²⁷⁷ There is precedent that an advisory opinion cannot address issues of the Governor’s purely statutory powers.²⁷⁸

Over the years, however, the distinction between constitutional and statutory concerns has become a subject of some debate. In some cases the Court’s majority has answered questions about statutory matters if there was some significant and identifiable nexus with the Governor’s constitutional

269. See MANUAL OF INTERNAL OPERATING PROCEDURES, *supra* note 20, at § II(G)(1).

270. *Id.* Advisory opinions almost always fall into the “special” category of case assignments. See discussion *supra* Part II.B.4.

271. See discussion *supra* Part II.B.1.

272. FLA. R. APP. P. 9.500(b)(1).

273. FLA. R. APP. P. 9.500(b)(2); MANUAL OF INTERNAL OPERATING PROCEDURES *supra* note 20, at § II(G)(1).

274. FLA. R. APP. P. 9.500(b)(2).

275. FLA. CONST. art. IV, § 1(c).

276. *Id.*

277. See, FLA. R. APP. P. 9.500(b)(1); MANUAL OF INTERNAL OPERATING PROCEDURES *supra* note 20, at § II(a)(1).

278. See *In re Advisory Opinion to the Governor*, 225 So. 2d 512 (Fla. 1969) [hereinafter *Advisory Opinion to the Governor, July 1969*].

powers or duties.²⁷⁹ For example, the Court has held that the Governor's constitutional powers are implicated by questions posed to the Court about new statutory tax schemes.²⁸⁰ This was done on grounds that the fiscal stability of the state was at stake, which implicated the Governor's fiscal duties under the Florida Constitution.²⁸¹

A similar result was reached in a case involving a statute modifying Florida's appellate districts and creating judicial vacancies.²⁸² There, the Court found discretion to act because "irreparable harm"²⁸³ otherwise might result, and the constitutional nexus relied upon was the Governor's duty to fill judicial vacancies.²⁸⁴ Thus, in actual practice, the Court sometimes has found it has discretion to answer questions about statutes significantly related to any one of the Governor's express constitutional powers or duties.

"Statutory" advisory opinions of this type, even if proper, are not without problems. Advisory opinions to the Governor have important limitations beyond the fact that they are not technically binding precedent. For example, the Court has held that advisory opinions cannot address federal issues.²⁸⁵ The Court has also held that they can address Florida constitutional issues only for prima facie validity.²⁸⁶ As a result, all federal questions remain unresolved, as well as any challenge to the statute's constitutionality as applied to specific individuals.²⁸⁷ A Justice in one of the tax cases suggested that an advisory opinion of this type can win the Governor, at best, a fragment of an answer.²⁸⁸

Advisory opinions to the Governor, in other words, appear most useful when they are confined to the stricter parameters suggested by the Florida Constitution itself: the Governor's constitutional powers and duties.²⁸⁹ The Supreme Court of Florida is the final authority on the meaning of the state

279. *E.g.*, *In re Advisory Opinion to the Governor*, 509 So. 2d 292, 301 (Fla. 1987) [hereinafter *Advisory Opinion to the Governor, July 1987*].

280. *Id.* at 301.

281. *See Advisory Opinion to the Governor, July 1987*, 509 So. 2d at 292 (citing *In re Advisory Opinion to the Governor*, 243 So. 2d 573, 576 (Fla. 1971)).

282. *In re Advisory Opinion to the Governor Request of June 29, 1979*, 374 So. 2d 959 (Fla. 1979) [hereinafter *June 29, 1979 Opinion*].

283. *Id.* at 962.

284. *Id.*

285. *Advisory Opinion to the Governor, July 1987*, 507 So. 2d at 302.

286. *Id.* at 301-02.

287. *Id.* at 301. This restriction is self-evident. Advisory opinions deal with abstract questions of law, not the concerns of single individuals not present in the court. "As applied" challenges, by their very nature, require a controversy raised by individuals. *See id.* at 302.

288. *Id.* at 319-20. Justice Barkett declined to answer the questions. *Advisory Opinion to the Governor, July 1987*, 507 So.2d at 319-320.

289. FLA. CONST. art. IV. § 1(c).

constitution, subject to the people's power of amendment.²⁹⁰ Advisory opinions confined to a question of pure Florida constitutional law are thus far more persuasive than ones that delve into the potential challenges to the validity of statutes or into matters regulated by federal law.

B. *Advisory Opinions Requested by the Attorney General*

A second type of advisory opinion authorized by the constitution is requested by the Attorney General. Cases of this type are confined solely to the question of whether a citizen's petition to amend the state constitution complies with technical requirements of the amendment process.²⁹¹ This type of jurisdiction is of recent vintage.²⁹² It was added to the constitution by the people of Florida to lessen the possibility that citizens might expend considerable time and resources on a petition initiative later declared invalid on technical grounds. Previously, there was no way for initiative proponents to obtain an advance court ruling on the validity of their petition.

Such a ruling is important because citizen petition initiatives are subject to two requirements imposed by state law. The proposed amendment must contain only a single subject²⁹³ and must include a fair and accurate ballot summary of no more than seventy-five words.²⁹⁴ The Supreme Court of Florida has determined that it cannot consider any issue beyond these two, including whether the amendment, if enacted, would violate the United States Constitution.²⁹⁵ Nor can the Court rewrite an unfair or inaccurate ballot summary.²⁹⁶ However, these are restrictions imposed not by the constitution, but by the enabling legislation, which could be amended to lift the re-

290. See *Fla. Star v. B.J.F.*, 530 So. 2d 286, 288 (Fla. 1988); see also FLA. CONST. art. XI, § 3.

291. See FLA. CONST. art. IV, § 10; see also FLA. CONST. art V, § 3(b)(10).

292. The relevant constitutional amendment creating this form of jurisdiction was adopted by the voters of Florida on November 4, 1986, and enabling legislation was approved the following year.

293. See FLA. CONST. art. XI, § 3.

294. See FLA. STAT. § 101.161(1) (2004).

295. See *In re Advisory Opinion to the Attorney General—Ltd. Political Terms in Certain Elective Offices*, 592 So. 2d 225, 227 (Fla. 1991) [hereinafter *Ltd. Political Terms in Certain Elective Offices*]. In early 1994, a case was pending before the Supreme Court of Florida in which several parties argued that advisory opinions to the Attorney General may properly address federal constitutional questions. *In re Advisory Opinion to the Attorney General—Restricts Laws Related to Discrimination*, 632 So. 2d 1018 (Fla. 1994) [hereinafter *Restricts Laws Related to Discrimination*]. In effect, these petitions asked the Court to recede from its earlier decision that the constitutional issues are not justiciable. *Limited Political Terms in Certain Elective Offices*, 592 So. 2d at 227.

296. *Smith v. Am. Airlines, Inc.*, 606 So. 2d 618, 621–22 (Fla. 1992).

strictions. A bill to accomplish just that was approved by the 1993 Florida Legislature but vetoed by the Governor²⁹⁷ and never became law. However, in 2004, the voters overwhelmingly approved an amendment to the Constitution requiring that anyone circulating an initiative petition to file the appropriate paperwork with the Custodian of State Records no later than February 1st of the year in which the general election is held. Further, the Supreme Court of Florida must render its written opinion no later than April 1st of the same year.²⁹⁸

An action requesting an advisory opinion of this type is commenced by the Attorney General, who is required by law to petition the Court once certain threshold requirements are met.²⁹⁹ The enabling legislation provides that proponents of the citizen petition initiative must register as a political committee; must submit the ballot title, substance, and text to the Secretary of State; and must obtain a letter from the state Division of Elections that a certain number of verified signatures have been obtained on the petition.³⁰⁰ At this juncture, the Secretary of State must submit the petition to the Attorney General,³⁰¹ who is required to petition the Court within thirty days.³⁰²

The Court has determined that advisory opinions of this type are handled substantially like those requested by the Governor.³⁰³ By analogy to gubernatorial advisory opinions, the Attorney General has adopted the practice of submitting the case to the Court by means of a letter addressed to the Justices.³⁰⁴ The two relevant questions must be posed and answered, because neither the Attorney General nor the Court has any discretion to expand or to restrict the issues.

The Attorney General is neither required to brief the issue nor to take any particular side in the case. However, the Attorney General's letter usually includes a statement outlining the facts, issues, and relevant law in an objective manner. While most of the letter requests do not advocate any

297. See H.R. 195, 1993 Leg., Reg. Sess. (Fla. 1993); S. 1278, 1993 Leg., Reg. Sess. (Fla. 1993).

298. See Div. of Elections, Fla. Dep't. of State, Constitutional Amendments Proposed by Initiative, at <http://election.dos.state.fl.us/initiatives/fulltext/10-60.htm> (last visited Mar. 12, 2005).

299. FLA. CONST. art. IV, § 10.

300. FLA. STAT. § 15.21 (2004). The number required is determined by a formula contained in this statute. *Id.*

301. *Id.*

302. § 16.061.

303. MANUAL OF INTERNAL OPERATING PROCEDURES, *supra* note 20, at § II(G)(2).

304. See Advisory Opinion to the Attorney Gen. English—the Official Language of Florida, 520 So. 2d 11, 12 (Fla. 1988) [hereinafter *Official English Language*] (noting case was submitted by letter).

particular result, there have been exceptions.³⁰⁵ Any interested party may file responses in the case, which usually is scheduled for oral argument. There have been instances where the cases are expedited.³⁰⁶

Although consideration of cases of this type is of relatively recent origin, the Court nevertheless decides these cases by drawing on precedent. Previously, challenges to proposed constitutional amendments could be brought by means of a mandamus action filed at any time prior to the date of the election.³⁰⁷ The Court has concluded that its new advisory jurisdiction is similar to cases presenting the same issues previously considered by way of mandamus, while subject to the inherent limitations of advisory opinions.³⁰⁸ Thus, earlier mandamus actions involving initiatives are relevant in determining the applicable law.

At one time the fact that this newer form of jurisdiction was regarded as “advisory” was assumed to mean that any opinion issued by the Court was persuasive but technically not binding, in keeping with the traditional understanding of advisory opinions.³⁰⁹ Nonetheless, it is increasingly hard to square this limited conception with the way the Court actually treats these cases. First, the Court still can entertain a later petition for mandamus provided that it does not attempt to relitigate issues already addressed in the advisory opinion.³¹⁰ To this extent the advisory opinion is not, strictly speaking, “advisory” at all because it does establish a kind of law of the case. More importantly, the Court clearly looks to its prior precedents in determining how to analyze and resolve such cases. The analysis does not simply change from case to case, and it clearly has evolved beyond the earlier decisional law established by mandamus.³¹¹

The standard for addressing the “single-subject” requirement wavered during the early 1980s but has recently become more stable. All that is required is that the proposed amendment have “a logical and natural oneness

305. Advisory Opinion to the Attorney Gen., re: Amendment to Bar Gov’t from Treating People Differently Based on Race in Pub. Educ., 778 So. 2d 888, 892–93 (Fla. 2000) [hereinafter *Race Amendment Opinion*] (showing that Attorney General firmly took the position that the proposed initiative violated ballot requirements).

306. E.g., Advisory Opinion to the Attorney Gen., re: Patients’ Right to Know About Adverse Med. Incidents, 880 So. 2d 617 (Fla. 2004).

307. Fla. League of Cities v. Smith, 607 So. 2d 397, 398 (Fla. 1992).

308. See *Id.* at 398–99.

309. *Id.*

310. *Id.* at 399.

311. See *Race Amendment Opinion*, 778 So. 2d at 888.

of purpose,”³¹² which occurs if all parts of the amendment may be “viewed as having a natural relation and connection as component parts, or aspects of a single dominant plan or scheme.”³¹³ The Court also has held that it is not necessarily relevant that the proposed amendment affects more than one provision of the Florida Constitution or more than one branch of government provided it meets the “oneness” standard.³¹⁴ This analysis has been criticized for its subjectivity³¹⁵ but currently remains the standard of review.³¹⁶

The standard for addressing the ballot summary issue has a more stable history. The Court has consistently held that the “summary must state ‘in clear and unambiguous language the chief purpose of the measure,’ but need not explain every detail or ramification.”³¹⁷ The chief evil addressed by this standard of review is to prevent the voters from being misled and to allow votes to be cast intelligently.³¹⁸ For example, the Court has held ballot summaries defective for suggesting that new rights were to be given to the people, when in fact rights were being taken away.³¹⁹ Moreover, the failure to include an adequate ballot summary cannot be cured by the fact that public information about the amendment was widely available.³²⁰

The Court has not adopted the practice of answering the Attorney General’s questions in the form of a letter signed by the concurring Justices, as happens with gubernatorial advisory opinions. Instead, the Court has issued its conclusions in the form of an opinion, possibly because this was done in the earlier mandamus actions.

V. MANDATORY APPELLATE JURISDICTION

The Supreme Court of Florida is vested with mandatory appellate jurisdiction over four specific categories of cases. These are: 1) death appeals;³²¹

312. Advisory Opinion to the Attorney Gen.—Ltd. Political Terms in Certain Elective Offices, 592 So. 2d 225, 227 (Fla. 1991) [hereinafter *Political Terms Opinion*] (quoting *Fine v. Firestone*, 448 So. 2d 984, 990 (Fla. 1984)).

313. *Id.* (citing *Fine*, 448 So. 2d at 990 (quoting *City of Coral Gables v. Gray*, 19 So. 2d 318, 320 (Fla. 1944))).

314. *Id.* (discussing *Weber v. Smathers*, 338 So. 2d 819 (Fla. 1976)).

315. *Id.* at 231 (Kogan, J., concurring in part, dissenting in part).

316. See *Race Amendment Opinion*, 778 So. 2d at 892.

317. *Id.*

318. *Id.* (quoting *Askew v. Firestone*, 421 So. 2d 151, 155 (Fla. 1982)).

319. *Evans v. Firestone*, 457 So. 2d 1351, 1355 (Fla. 1984) (discussing *Askew*, 421 So. 2d at 151); *People Against Tax Revenue Misgmt., Inc. v. County of Leon*, 583 So. 2d 1373, 1376 (Fla. 1991).

320. *Wadhams v. Bd. of County Comm’rs*, 567 So. 2d 414, 417 (Fla. 1990).

321. FLA. CONST. art. V, § 3(b)(1).

2) appeals involving the validity of public-revenue bonds;³²² 3) appeals from the Florida Public Service Commission;³²³ and 4) appeals from opinions of a district court declaring a state statute or provision of the Florida Constitution invalid.³²⁴ Jurisdiction in the first three subcategories is exclusive, meaning that no other state appellate court can hear the case.³²⁵ All cases brought under the Court's mandatory jurisdiction are called "appeals," as distinguished from "reviews."³²⁶

The reasons for vesting the Court with some limited forms of mandatory, exclusive appellate jurisdiction, are varied. In death appeals, for example, the Court has noted that its mandatory appellate jurisdiction rests in part on the need to ensure uniformity of the applicable law throughout Florida.³²⁷ Uniformity is essential in death cases because of a variety of federal constitutional restrictions. Similar, but not necessarily the same reasoning applies to bond validations and appeals to the Public Service Commission, where the public policy implications are apparent. Enormous amounts of public money and great potential liability often are at stake in these cases, and a determination by the state's highest court is necessary to dispel questions as to whether publicly issued bonds are valid and whether utility regulations and rates are lawful. Without such finality, bonds might be considered a poor risk by investors who might suddenly be cast in doubt by lingering and unresolved legal issues and utility services might be delayed or impeded by protracted appellate litigation or unresolved doubts in the law. Thus, the framers of the constitution vested the Supreme Court of Florida with mandatory appellate jurisdiction to resolve these matters.³²⁸

A. *Death Appeals*

The Court's authority over death appeals is one of the most straightforward. Very simply, the Court has exclusive, mandatory, and plenary jurisdiction over any final judgment imposing a sentence of death³²⁹ and all other

322. FLA. CONST. art. V, § 3(b)(2).

323. *Id.*

324. FLA. CONST. art. V, § 3(b).

325. FLA. CONST. art. V, § 3.

326. See FLA. CONST. art. V, § 3(b)(1) (using terms "appeal" and "review" in contradistinction). The distinction apparently has a long history in Florida, where courts sometimes have said that the word "appeal" denotes an appellate proceeding that may be had as a matter of right. See *Zirin v. Charles Pfizer & Co.*, 128 So. 2d 594, 597 (Fla. 1961).

327. *Tillman v. State*, 591 So. 2d 167, 169 (Fla. 1991).

328. See FLA. CONST. art. V, § 3(b)(1), (2).

329. FLA. CONST. art. V, § 3(b)(1).

matters arising from the same trial and sentencing.³³⁰ Moreover, jurisdiction is automatic, meaning the Court must hear the case even if the inmate sentenced to death does not wish to appeal.³³¹ In fact, this is the only category of jurisdiction that is automatic. In the others, failure to bring an appeal or seek review does not deprive the Court of jurisdiction.³³² A murder conviction resulting in any penalty less than death is appealed to the appropriate district court.

The disputes over this form of jurisdiction often relate to the collateral proceedings that follow the conclusion of the appeal. The Court commonly cites its constitutional jurisdiction over death appeals as a basis for hearing collateral challenges.³³³ This suggests the plenary nature of the jurisdiction granted once the Court finds there is a final judgment of death in the case, a conclusion reinforced by the Court's habeas corpus³³⁴ and "all writs" jurisdiction.³³⁵ On rare occasions the Court has agreed to review such matters by way of writ of prohibition.³³⁶

Interlocutory appeals in ongoing trials that might result in a death penalty also have raised issues of jurisdiction. The argument against the Court hearing these cases rests chiefly on the fact that the constitution grants jurisdiction only where there is a final judgment imposing the death penalty.³³⁷ Thus, while it is clear that the Court can hear interlocutory matters in *post conviction* death cases—those in which the death sentence has been imposed and remains intact³³⁸—the same conclusion is less clear where the death sentence has been vacated or is only a future possibility. In 1979, the Court

330. See *Asay v. Fla. Parole Comm'n*, 649 So. 2d 859 (Fla. 1994). See also *Savoie v. State*, 422 So. 2d 308 (Fla. 1982) (stating once the Court accepts jurisdiction to resolve a legal conflict, it has discretion to consider other issues).

331. *Muehleman v. State*, 503 So. 2d 310, 313 (Fla. 1987) (citing FLA. STAT. § 921.141(4) (1985)), *cert. denied*, 484 U.S. 882 (1987).

332. There are limited but rare exceptions when the Court exercises its administrative jurisdiction *sua sponte* to make rules and regulate The Florida Bar. Moreover, administrative acts of the Court are not judicial acts, properly speaking.

333. *E.g.*, *Johnson v. Singletary*, 612 So. 2d 575, 576 (Fla. 1993), *cert. denied*, 508 U.S. 901 (1993).

334. See discussion *infra* Part VII.D.

335. See discussion *infra* Part VII.E.

336. See, *e.g.*, *State v. Donner*, 500 So. 2d 532 (Fla. 1987); *State v. Bloom*, 497 So. 2d 2 (Fla. 1986). The writ of prohibition is discussed *infra* Part VII.C.

337. See FLA. CONST. art. V, § 3(b)(1).

338. *Trepal v. State*, 754 So. 2d 702, 705–06 (Fla. 2000). However, the standard for determining whether to accept such interlocutory matters is whether the order below "does not conform to the essential requirements of law and may cause irreparable injury for which appellate review will be inadequate." *Id.* at 707. There are other strict filing requirements for these types of appeals. *Id.*

stated that there is no reason interlocutory appeals in death cases should not go to a district court of appeal when they involve matters routinely reviewed there.³³⁹ The Court's 1979 analysis of this issue came prior to the jurisdictional reforms of 1980, but the rationale remains the same.³⁴⁰ However, the Court has established that it retains its exclusive appellate jurisdiction over collateral matters on remand if it has vacated the death sentence but not the underlying conviction.³⁴¹

In 1988, the Court appeared to hold that decisions in interlocutory appeals to a district court in a capital case become "law of the case," perhaps even when no further appeal to the Supreme Court of Florida was possible at the time.³⁴² This suggestion contradicted a 1984 holding to the contrary.³⁴³ A possible result is that the Court could be deprived of its ability to consider an interlocutory issue that affects the validity of a later death sentence; a result that appears contrary to the principle of automatic and full review in death cases.³⁴⁴ Possible solutions to this issue include the recognition of some form of exclusive Supreme Court jurisdiction in all interlocutory appeals in capital cases or to hold that the law of the case doctrine does not apply in this context. Exclusive jurisdiction could be premised on the Court's jurisdiction over judgments of death or its all writs power.³⁴⁵ However, this view apparently was rejected by the Court in 2000.³⁴⁶

Moreover, either of these approaches strains the constitution's language and risks burdening the Court's docket with interlocutory appeals from cases that may or may not result in a death penalty. Limiting the law of the case doctrine seems more consistent both with the pre-1988 case law³⁴⁷ and the language of the constitution itself. The Supreme Court of Florida's jurisdiction requires a final judgment of death, not mere speculation that such a judgment will be entered.³⁴⁸ Moreover, interlocutory appeals in death cases rarely involve matters the district courts do not routinely consider, a state-

339. *State v. Preston*, 376 So. 2d 3, 4 (Fla. 1979).

340. *State v. Fourth Dist. Court of Appeal*, 697 So. 2d 70, 71 (Fla. 1997).

341. *Id.*

342. *LeCroy v. State*, 533 So. 2d 750, 754 (Fla. 1988), *cert. denied*, 492 U.S. 925 (1989).
But see *Preston v. State*, 444 So. 2d 939, 942 (Fla. 1984).

343. *Preston*, 444 So. 2d at 942.

344. *See id.*

345. *See* discussion *infra* Part VII.E.

346. *See Trepal*, 754 So. 2d at 707.

347. *See* discussion *supra* Part II.B.

348. *See* FLA. CONST. art. V, § 3(b)(1).

ment that the Court itself has now specifically endorsed in the context of death cases³⁴⁹ and that district courts have applied.³⁵⁰

B. Bond Validation

The second form of mandatory, exclusive appellate jurisdiction deals with a trial court's validation or rejection of bond issues made for some public purposes.³⁵¹ Typically, the bonds are issued by governmental units to build infrastructure, to finance public projects, or to otherwise advance the public welfare. This is a type of jurisdiction authorized by the Florida Constitution but requires enabling legislation³⁵² that has been enacted.³⁵³

The jurisdictional grant is narrow. The Court has said that its sole function in such cases is to determine whether the governmental agency issuing the bonds had the power to act as it did, and whether the agency exercised its power in accordance with the law.³⁵⁴ Some procedural time limits are abbreviated in bond cases to allow expedited review.³⁵⁵ The determination of legality can include questions that might impugn the bond issue, such as the propriety of an election in which voters approved a funding source securing the issue.³⁵⁶ Moreover, many types of bonds are proper only if issued for public, municipal, or other specific purposes.³⁵⁷ But these restrictions are sometimes broadly construed. "Public purpose," for instance, has been found to include even some projects of primary benefit to relatively small segments of the public³⁵⁸ or even private enterprise.³⁵⁹ Perhaps the most fa-

349. *Richardson v. State*, 706 So. 2d 1349, 1357 (Fla. 1998) (citing *State v. Pettis*, 520 So. 2d 250, 253 (Fla. 1988) (involving interlocutory matters in case not involving capital punishment)).

350. *E.g.*, *State v. Richards*, 843 So. 2d 962, 968 (Fla. 3d Dist. Ct. App. 2003).

351. FLA. CONST. art. V, § 3(b)(2).

352. *See id.*

353. FLA. STAT. § 75.08 (2004).

354. *State v. Leon County*, 400 So. 2d 949, 950 (Fla. 1981).

355. FLA. R. APP. P. 9.110(i), 9.330(c).

356. *People Against Tax Revenue Mismanagement, Inc. v. County of Leon*, 583 So. 2d 1373, 1376 (Fla. 1991).

357. *E.g.*, *State v. City of Orlando*, 576 So. 2d 1315, 1316–18 (Fla. 1991) (receding from *State v. City of Panama City Beach*, 529 So. 2d 250 (Fla. 1988)); *see* FLA. CONST. art. VII, §§ 2, 10–17; FLA. STAT. §§ 75.01–17 (2004).

358. *N. Palm Beach County Water Control Dist. v. State*, 604 So. 2d 440 (Fla. 1992).

359. *E.g.*, *Linscott v. Orange County Indus. Dev. Auth.*, 443 So. 2d 97, 101 (Fla. 1983); *State v. Osceola County Indus. Dev. Auth.*, 424 So. 2d 739, 742 (Fla. 1982).

mous of these cases involved the validation of bonds for reclamation and water control in the vicinity of Walt Disney World.³⁶⁰

C. *Public Service Commission Appeals*

The third form of mandatory, exclusive jurisdiction governs appeals from orders of the Florida Public Service Commission affecting rates or services of electric, gas, or telephone utilities.³⁶¹ Jurisdiction requires enabling legislation, which has been enacted.³⁶² It deserves emphasis that the orders under appeal must relate to rates or services.³⁶³ Other types of issues often arise in Public Service Commission cases and, therefore, do not fall within the Supreme Court of Florida's exclusive jurisdiction.³⁶⁴

The enabling legislation adds a few insights into the Court's jurisdiction. For instance, it specifies that appeal is obtained "upon petition."³⁶⁵ Additionally, one statute equates the term "telephone service" with "telecommunications company,"³⁶⁶ thus defining the Supreme Court of Florida's jurisdiction to reach most forms of communication for hire within the state.³⁶⁷ There appear to be no cases addressing whether this statutory definition comports with the strict language of the constitution, which only uses the word "telephone,"³⁶⁸ or indeed whether the term "telephone" now must be read more inclusively as new forms of communication emerge in an era of technology unforeseen when this constitutional language was framed.

D. *Statutory/Constitutional Invalidity*

The final form of mandatory jurisdiction differs from the other three because it is not exclusive. Cases involving statutory or constitutional invalidity are appealed from a district court decision that has stricken a provision of the *Florida Statutes* or Florida Constitution.³⁶⁹ The plain language of the constitution requires that this decision must actually and expressly hold the statu-

360. *State v. Reedy Creek Improvement Dist.*, 216 So. 2d 202 (Fla. 1968) (case arose prior to adoption of the 1968 Constitution).

361. *See* FLA. CONST. art. V, § 3(b)(2).

362. FLA. STAT. §§ 364.381, 366.10 (2004).

363. *See* § 364.381.

364. *E.g.*, *State v. Lindahl*, 613 So. 2d 63 (Fla. 2d Dist. Ct. App. 1993). For a discussion of jurisdiction in other types of cases, *see Constitutional Jurisdiction*, *supra* note 3.

365. FLA. STAT. § 366.10 (2004).

366. FLA. STAT. § 364.381 (2004).

367. *See* § 364.02(7).

368. *See* FLA. CONST. art. V, § 3(b)(2).

369. FLA. CONST. art. V, § 3(b)(1).

tory or constitutional provision invalid.³⁷⁰ Apparently, it is not enough that the opinion can merely be construed to have reached the same result tacitly.³⁷¹ Likewise, jurisdiction does not exist if only a single judge on a three-judge district-court panel “held” the statute invalid, even if that judge’s opinion is characterized as the “opinion” of the Court. This rests on the sound principle that the actual holding of the Court is what a majority has voted to approve, not what the minority has opined.³⁷²

However, commentators have suggested that the Court might properly exercise this type of jurisdiction in the rare event that a district court has summarily affirmed a lower court’s ruling expressly invalidating a statute.³⁷³ It is not difficult to interpret this grant of *mandatory* jurisdiction as entirely eliminating the concerns applicable in reviewing “per curiam affirmed” decisions in other contexts,³⁷⁴ at least where the trial court itself clearly declared a statute invalid. This situation would contrast with the problem contemplated by the inherency doctrine: How should the Court handle decisions from the lower courts that have not clearly declared a statute invalid? Even if this view is rejected, however, another possible basis for review could be the Court’s all writs jurisdiction, discussed below.³⁷⁵ It is entirely possible that serious disruption in the state’s legal process could occur if a trial court’s plain declaration of statutory invalidity remained unreviewable by the Supreme Court simply because it is shielded behind a district court’s “per curiam affirmed” decision.

370. *Id.* Any direct statement by a district court that a statute or constitutional provision is invalid almost certainly would be construed as a holding and thus part of the decision, even if unnecessary to the case. Review then could be had on that basis. However, the Supreme Court of Florida did decline review in one case with peculiar facts. In *Hanft v. Phelan*, the court dismissed jurisdiction where invalidity was only one of several alternative holdings and the district court had remanded for an evidentiary hearing to determine which of the holdings was proper in the specific case. 488 So. 2d 531 (Fla. 1986). Absent the remand for an evidentiary hearing, it seems unlikely that *Hanft* would have been dismissed merely because there were alternative holdings. *Id.*

371. For a discussion of this “inherent invalidity” argument, see *Constitutional Jurisdiction*, *supra* note 3. As this article notes, the first “inherent invalidity” case in which jurisdiction was denied apparently was *Southern Gold Citrus v. Dunnigan*, 399 So. 2d 1145 (Fla. 1981) (unpublished table decision). For a discussion of the now-abolished inherency doctrine, see discussion *infra* Parts VI.A–B.

372. *Byrd v. State* 880 So. 2d 616, 617 (Fla. 2004).

373. *Constitutional Jurisdiction*, *supra* note 3, at 169–70.

374. *But cf.*, *Grate v. State*, 750 So. 2d 625, 626 (Fla. 1999). *Grate* can be distinguished on grounds it mandates denial of review of per curiam affirmed decisions when review is sought in the Supreme Court by way of extraordinary writ. *Id.* Nevertheless, the broad wording of *Grate* can be read as forbidding jurisdiction over per curiam affirmed decisions on any basis. See *id.*

375. See discussion *infra* Part VII.E.

There has been concern that this form of jurisdiction might only apply when a statutory or constitutional provision is declared facially invalid and not where invalidity is determined on an “as applied”³⁷⁶ challenge. However, the Court has not recognized this distinction. “As applied” invalidity has been used as the basis for jurisdiction, though the Court sometimes has done so without comment by extension from earlier case law.³⁷⁷ Before the 1980 reforms, “as applied” jurisdiction had proven controversial, being rejected in 1961,³⁷⁸ and then authorized again in 1963 by a divided court.³⁷⁹ The practice was reaffirmed in 1979 shortly before the most recent jurisdictional reforms, again by a fragmented court,³⁸⁰ and has remained in use since with little discussion.³⁸¹

Earlier criticisms may still have some merit in that an “as applied” decision invalidates a statute or constitutional provision only in cases with similar and limited facts. Thus, there is a less pressing reason for mandatory review, because the decision under appeal essentially leaves the statute or provision in effect, subject to a fact-specific exception. However, much of the earlier criticism focused on the fact that trial court orders declaring a statute invalid were directly appealable to the Court.³⁸² This direct review is no longer available.

It is also worth noting that the apparent purpose of mandatory jurisdiction in these cases is to achieve a degree of finality and uniformity of law. If the Court were not required to hear an appeal, the district court decisions in question might remain on the books for years without being either approved or disapproved. As a result, statutes or constitutional provisions might be enforced in some appellate districts but not others. Mandatory jurisdiction greatly diminishes these possibilities.

Such concerns cannot be completely eliminated, however. For example, any state court decision striking a provision of the Florida Constitution could do so only on grounds that the provision violated the United States Constitution, a federal statute, or a treaty binding upon the state through the Supremacy Clause.³⁸³ That necessarily means that the resolution of the issue

376. See *Constitutional Jurisdiction*, *supra* note 3, at 170.

377. See *Psychiatric Assoc. v. Siegel*, 610 So. 2d 419, 420 (Fla. 1992) (accepting jurisdiction for “as applied” invalidity).

378. *Stein v. Darby*, 134 So. 2d 232, 237 (Fla. 1961).

379. *Snedeker v. Vermmar, Ltd.*, 151 So. 2d 439, 441–42 (Fla. 1963).

380. *Cross v. State*, 374 So. 2d 519, 521 (Fla. 1979).

381. *E.g.*, *State v. Iacovone*, 660 So. 2d 1371 (Fla. 1995).

382. See *Constitutional Jurisdiction*, *supra* note 3, at 166.

383. U.S. CONST. art. VI, cl. 2. Of course we are not talking here about the far different situation in which a constitutional amendment is stricken because of ballot defects, which has

by the Supreme Court of Florida would rest entirely on federal questions that could be decided differently by federal courts. Thus the determination of the case by the Supreme Court of Florida would not necessarily be the final word.

VI. DISCRETIONARY REVIEW JURISDICTION

The discretionary review jurisdiction of the Supreme Court of Florida accounts for the largest share of the petitions that it receives.³⁸⁴ This type of jurisdiction is discretionary because the Court, in every instance, can decline to hear a case and in some instances will decline because its case law has restricted discretion.³⁸⁵ All cases brought under this type of jurisdiction technically are called "reviews," as distinguished from "appeals," though lawyers and justices alike sometimes use the terms interchangeably.³⁸⁶ The distinction between the terms is found in the constitution itself.³⁸⁷ In a more colloquial sense, "reviews" in this category do, in fact, constitute a broad type of "appellate" jurisdiction because the Court is reviewing actions taken by lower courts.

Jurisdiction over discretionary review cases is invoked when a party files two copies of a notice that review is being sought, which must be done within thirty days of rendition³⁸⁸ of the order in the case.³⁸⁹ The notice must be filed with the clerk of the district court, must be accompanied by the proper fee, and must be in the form prescribed by rule.³⁹⁰ Briefing on jurisdiction is allowed in all cases except where the district court has certified a question of great public importance, or has certified that the case is in direct conflict with the decision of another district court.³⁹¹ The Court has not required briefing on jurisdiction in these cases beyond the filing of the notice.

occurred at least once after the vote on the amendment. See *Armstrong v. Harris*, 773 So. 2d 7 (Fla. 2000).

384. For example, there were approximately ninety-three such petitions filed in 2002.

385. For a discussion of "discretion" see *supra* Part III.A.3.

386. For a discussion distinguishing reviews from appeals, see *supra* text accompanying note 326.

387. See FLA. CONST. art. V, § 3(b).

388. Rendition occurs when a signed, written order is filed with the clerk of the lower tribunal, subject to some exceptions. See FLA. R. APP. P. 9.020(h).

389. FLA. R. APP. P. 9.120(b).

390. FLA. R. APP. P. 9.200(b)-(c), 9.900.

391. FLA. R. APP. P. 9.120(d). "Certified question" is discussed *infra* Part VI.E. "Certified conflict" is discussed *infra* Part VI.F. The historical reason underlying the lack of jurisdictional briefing in this category of cases now has been called into question by subsequent refinements in the Court's jurisdictional case law. See *infra* notes 593-97 and accompanying text.

A. Declaration of Statutory Validity

The first type of discretionary review jurisdiction governs district court decisions expressly declaring a state statute valid.³⁹² For jurisdiction to exist, the decision under review must contain some statement to the effect that a specified statute is valid or enforceable.³⁹³ The constitution does not directly say whether the statement must be necessary to the result reached.³⁹⁴ In an analogous context, however, the Court has expressly premised its jurisdiction on statements that were dicta.³⁹⁵

While this conclusion may be justifiable in the sense that dicta have persuasive force, it does seem somewhat at odds with the constitution's requirement that jurisdiction be based on a "decision."³⁹⁶ At least in other contexts, it has been held that the decision is the result reached and is not gratuitous dicta in the opinion.³⁹⁷ However, in an earlier decision the Court indicated that the term "decision," as used in the constitution's jurisdictional sections, encompasses not merely the result but also the entire opinion.³⁹⁸ Of course, the fact that a statute is declared valid in dicta may provide a less compelling basis for the Court to exercise its discretion over the case.

Importantly, the 1980 constitutional jurisdictional amendments overruled the much criticized "inherency doctrine"³⁹⁹ by which review might be had if the Court believed that an opinion tacitly found a statute valid.⁴⁰⁰ This might occur, for example, where the opinion applied the statute as though it were valid but did not directly discuss or make a finding of validity.

392. FLA. CONST. art. V, § 3(b)(3).

393. See *Cantor v. Davis*, 489 So. 2d 18 (Fla. 1986).

394. See FLA. CONST. art. V, § 3(b)(3).

395. See *Watson Realty Corp. v. Quinn*, 452 So. 2d 568, 569 (Fla. 1984) (involving express and direct conflict of decisions).

396. See FLA. CONST. art. V, § 3(b)(3).

397. The Court has recognized the importance of the distinction in analogous contexts. See *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980) (jurisdiction based on express and direct conflict of decisions of different courts of appeal or the supreme court).

398. *Seaboard Air Line R.R. Co. v. Branham*, 104 So. 2d 356, 358 (Fla. 1958).

399. *Harrell's Candy Kitchen, Inc. v. Sarasota-Manatee Airport Auth.*, 111 So. 2d 439 (Fla. 1959).

400. See *Constitutional Jurisdiction*, *supra* note 3, at 183. The situation contemplated by the inherency doctrine, involving statutory *validity*, should be contrasted with the situation where a trial court declares a statute *invalid* and the district court then affirms by per curiam affirmed decision. In the latter case, the Court still might have jurisdiction based on other provisions of Article V, section 3, of the Florida Constitution. See discussion *infra* Parts VI.B–H.

B. Construction of State or Federal Constitutions

The second form of discretionary jurisdiction arises when the decision of the district court below expressly construes a provision of the state or federal constitutions.⁴⁰¹ The operative phrase “construes a provision” was imported into the 1980 jurisdictional reforms essentially unchanged from what had existed previously, except that the word “expressly” was added.⁴⁰² Commentators in 1980 stated their view that the new requirement of “expressness” merely codified prior case law.⁴⁰³ Thus, it does seem likely that pre-1980 case law on this type of jurisdiction remains persuasive and that the addition of the word “expressly” may signal either an affirmation of existing case law or a more stringent test for jurisdiction than was mandated earlier.

Prior to the 1980 reforms, the Court held that the inherency doctrine does not apply to this type of jurisdiction.⁴⁰⁴ Rather, the decision under review had to “explain, define or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision.”⁴⁰⁵ The key word was “doubts;” the opinion under review had to contain a statement recognizing or purporting to resolve some doubt about a constitutional provision.⁴⁰⁶ Thus, jurisdiction does not exist if only a single judge on a three-judge district court panel “construed” a statute or provision of the Constitution, even if that judge’s opinion is characterized as the “decision” of the Court.⁴⁰⁷ This rests on the sound principle that the actual holding of the Court is what a majority has voted to approve, not what the minority has opined.⁴⁰⁸ For much the same reason, the statement of construction must be a “ruling”⁴⁰⁹ that was more than a mere application of a settled constitutional principle.⁴¹⁰ Absent the obligatory act of construction, it was not enough that a petitioner simply alleged an unconstitutional result.⁴¹¹ Commentators called this the “explain or amplify” requirement.⁴¹²

401. FLA. CONST. art. V, § 3(b)(3).

402. See *Appellate Reform*, *supra* note 223, at 184–85.

403. *Id.* at 184.

404. *Ogle v. Pepin*, 273 So. 2d 391, 392 (Fla. 1973).

405. *Id.* (quoting *Armstrong v. City of Tampa*, 106 So. 2d 407, 409 (Fla. 1958)).

406. *Id.*

407. *Byrd v. State*, 880 So. 2d 616, 617 (Fla. 2004).

408. *Id.*

409. *Dykman v. State*, 294 So. 2d 633, 635 (Fla. 1973), *cert. denied*, 419 U.S. 1105 (1975).

410. *Rojas v. State*, 288 So. 2d 234, 236 (Fla. 1973), *cert. denied*, 419 U.S. 851 (1974).

411. See *Carmazi v. Bd. of County Comm’rs*, 104 So. 2d 727, 728–29 (Fla. 1958).

412. *Appellate Reform*, *supra* note 223, at 240.

This analysis still would appear to be sound, especially in light of the additional requirement that the construction be express. The Supreme Court of Florida is the one state court that can resolve legal doubts on a statewide basis. Resolving constitutional doubts is a highly important function because it results in more predictable organic law. No similar purpose is served by the Court hearing a case that has merely reiterated settled principles. The Court's jurisdiction, for example, may be exercised to say whether an evolution in constitutional law developed by the lower appellate courts is proper,⁴¹³ or to resolve a doubt those courts have expressly noted.⁴¹⁴ The Court's more recent cases appear to be in accord with the pre-1980 analysis outlined above.⁴¹⁵

Issues have arisen, however. For one thing, the line that separates "explain or amplify" from "mere application" has sometimes been hard to distinguish. In the 1975 case *Potvin v. Keller*,⁴¹⁶ for example, a district court opinion merely mentioned the appellants' Fourteenth Amendment argument and then affirmed the trial court's order without stating whether the Fourteenth Amendment had any bearing on the decision.⁴¹⁷ The Supreme Court of Florida's majority in *Potvin* buttressed its jurisdiction by noting that the district court had "ruled" that "no constitutional infirmity" existed based on the specific facts at hand.⁴¹⁸ Later in the opinion's analysis, the majority noted that the district court's opinion "may" have overstated federal case law when talking about constitutional and statutory rights that were not further identified.⁴¹⁹ Thus, the district court arguably had tried to eliminate a doubt about the Fourteenth Amendment. A misapplication or misstatement of settled law can be viewed as an evolutionary development deserving correction; but on *Potvin's* peculiar facts, it appears that some straining was needed to reach so far, especially because the lower court's result was affirmed.

The difficulty becomes especially evident when a second question is posed: How specifically must the district court identify a constitutional provision it is construing? The district court in *Potvin* did not premise its actual holding on any specific constitutional provision, though it did construe a

413. Any evolution in law by a lower court inherently creates a "doubt." Is the new principle or the new application correct?

414. A district court sometimes may outline its doubts about what appears to be a settled constitutional principle it is applying. The statement of doubt creates an issue that sometimes may deserve resolution by the Supreme Court of Florida.

415. E.g., *Foster v. State*, 613 So. 2d 454 (Fla. 1993); *City of Ocala v. Nye*, 608 So. 2d 15 (Fla. 1992); *City Nat'l Bank v. Tescher*, 578 So. 2d 701 (Fla. 1991).

416. 313 So. 2d 703 (Fla. 1975), *aff'd* 299 So. 2d 149 (Fla. 3d Dist. Ct. App. 1974).

417. *Id.* at 704.

418. *Id.* at 704 n.1.

419. *Id.* at 705.

federal case dealing with the Fourteenth Amendment. In fact, a reader could not finally determine that the Fourteenth Amendment was being construed in *Potvin* without considering the opinion of the federal case cited therein.⁴²⁰

This analysis may risk creating a kind of “incorporation-by-reference” jurisdiction any time an opinion cites to other authorities analyzing a constitutional provision. Such a possibility is especially difficult to square with the 1980 amendment’s requirement that construction must be “express.” In fact, the 1980 jurisdiction amendments could be viewed as superseding *Potvin* by adding the requirement that constitutional construction be “express.”⁴²¹ *Potvin* probably is now best understood as a case of limited precedential value in which the Court stretched the envelope of its jurisdiction to correct a deficient lower court analysis that, nevertheless, had reached a correct result.

Perhaps a better approach is the one suggested in the Court’s earlier cases. For jurisdiction to exist, the district court’s opinion must explain or amplify some identifiable constitutional provision in a way that is an evolutionary development in the law or that expresses doubt about some legal point.⁴²² Misapplication of earlier law could rise to this level to the extent that it can be considered an evolutionary development; but even then, the decision must contain a discussion of a specific constitutional provision. While it would be needlessly technical to require a specific citation, any reference sufficient to identify a particular constitutional provision may qualify.⁴²³

It remains to be seen whether the Court will recognize dicta as a sufficient basis for jurisdiction in cases of this type. The Court has expressly used dicta to establish jurisdiction in analogous contexts,⁴²⁴ and thus, probably could do so here as well. Dicta establishing some new principle of constitutional law would have persuasive value, though perhaps not quite amounting to “rulings.”⁴²⁵ Review might be justified on that basis, especially where the dicta could be disruptive of established law. In any event, jurisdiction remains discretionary and could be declined if the dicta seem harmless.

420. See *Potvin v. Keller*, 299 So. 2d 149, 151 (Fla. 3d Dist. Ct. App. 1974) (citing *In re Gault*, 387 U.S. 1 (1967)).

421. FLA. CONST. art. V, § 3(b)(3).

422. *Ogle v. Pepin*, 273 So. 2d 391 (Fla. 1973); *Dykman v. State*, 294 So. 2d 633, 634–35 (Fla. 1973).

423. See *Holbein v. Rigot*, 245 So. 2d 57, 59 (Fla. 1971).

424. *Watson Realty Corp. v. Quinn*, 452 So. 2d 568, 569 (Fla. 1984).

425. See *Dykman*, 294 So. 2d at 635; but cf. *Seaboard Air Line R.R. v. Branham*, 104 So. 2d 356, 358 (Fla. 1958) (stating term “decision” as used in the constitution’s jurisdictional provisions includes the entire written opinion).

C. *Opinions Affecting Constitutional or State Officers*

The third basis of discretionary review jurisdiction exists when a decision of a district court expressly affects a class of constitutional or state officers.⁴²⁶ Again, the operative language here was imported into the 1980 revisions nearly unchanged from the pre-1980 constitution, but again with the word “expressly” added. Commentators in 1980 noted that the “expressness” requirement had the principle purpose of foreclosing any review of a district court decision issued without opinion.⁴²⁷ The Court has adopted this view.⁴²⁸ In that light, the pre-1980 case law was largely unaffected and probably remains persuasive.

Consistent with the “expressness” requirement, the Court in 1974 held that a decision does not fall within this type of jurisdiction unless it meets a very restrictive test; it must “*directly* and, in some way, *exclusively* affect the duties, powers, validity, formation, termination[,] or regulation of a particular class of constitutional or state officers.”⁴²⁹ Thus, the decision must do more than simply modify, construe, or add to the general body of Florida law. If other criteria are met, it is not necessarily dispositive that members of a valid class were or were not litigants in the district court.⁴³⁰ The Court has said that jurisdiction could exist even where no class members were parties to the action, provided the decision affects the entire class in some way “unrelated to the specific facts of [that] case.”⁴³¹

In most instances, it would appear safe to assume that the parties to the proceedings below are the only ones allowed to seek review in the Supreme Court of Florida, even though they may not be members of the “affected class.” However, this has not always been true. One case, *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender*,⁴³² was accepted even though review was sought by governmental agencies not actually a party in the proceedings below.⁴³³ In any event, the case had very unusual facts, and some may question whether it was erroneously assigned to this particular subcategory of jurisdiction.

426. FLA. CONST. art. V, § 3(b)(3).

427. See *Constitutional Jurisdiction*, *supra* note 3, at 187.

428. See *School Bd. of Pinellas County v. Dist. Court of Appeal*, 467 So. 2d 985, 986 (Fla. 1985).

429. *Spradley v. State*, 293 So. 2d 697, 701 (Fla. 1974).

430. *Id.* at 701–02.

431. *Id.* at 701.

432. 561 So. 2d 1130 (Fla. 1990).

433. *Id.*

The case arose in 1990 when a district court entered a sua sponte order prohibiting a public defender from bringing appeals arising outside his own circuit.⁴³⁴ This, of course, would require public defenders in other circuits to handle their own appeals. Because the public defenders in other circuits lacked adequate resources, it appeared that county governments would be forced to pay for court-appointed private lawyers in their own circuits. As a consequence, several county governments then filed a “motion for rehearing,” which was summarily denied. The county governments then sought and obtained review in the Supreme Court of Florida, based not on their own constitutional status, but on the basis that the district court’s order affected the duties of public defenders in other counties.⁴³⁵

The act of filing the “motion for rehearing” somehow made the county governments a “party,” but this is not at all clear. This situation also could be viewed as a determination that the counties, as affected parties, were granted the right to intervene, albeit not explicitly. The summary order of dismissal is equally consistent with the view that the district court refused to recognize the county governments as a party. Importantly, however, it appears that no one raised or argued any objections to jurisdiction when the matter was brought to the Supreme Court of Florida. It thus seems highly unlikely that the Court was creating any form of “third-party standing.”

Whatever the case, *In re Order on Prosecution of Criminal Appeals* may be characterized as an exercise of the Court’s “all writs” jurisdiction, which is discussed in greater detail below.⁴³⁶ “All writs” review previously has been allowed to bring serious governmental crises for expedited review where some factual or procedural quirk threatens to deprive the Court of its “ultimate jurisdiction.”⁴³⁷ That situation almost certainly existed here, where a technical lack of standing might have frustrated the Court’s ultimate ability to review an important case that could have been brought to the Court by someone else or in some other form.⁴³⁸

Another problem in this form of jurisdiction is the definition of the phrase “class of constitutional or state officers.” The Court has held that the word “class” means there must be more than one officer of the type in ques-

434. *Id.* at 1132.

435. *Id.* at 1131–33; see Brief on Jurisdiction of Collier County, *In re Order on Prosecution of Criminal Appeals* by the Tenth Judicial Circuit Public Defender, 561 So. 2d 1130 (Fla. 1990) (No. 74-574).

436. See discussion *infra* Part VII.E.

437. *E.g.*, Fla. Senate v. Graham, 412 So. 2d 360, 361 (Fla. 1982).

438. See discussion *supra* Part III.A.3 for a discussion of the reasons why the lack of standing might have frustrated the Court’s ultimate ability to review the case.

tion,⁴³⁹ and there is no jurisdiction over a decision affecting only a single board with multiple members where the sole powers affected are those of the board as a single entity.⁴⁴⁰ In such a situation, the entity constitutes only one “officer.”⁴⁴¹ The fact that an office or board is unique, would appear to mean that there is no jurisdiction.⁴⁴² At a minimum, there must be two or more officers or entities who separately and independently exercise identical powers of government that are peculiarly affected by the district court’s decision.⁴⁴³ Jurisdiction would exist, for example, where a decision affects every board of county commissioners in the state in some way peculiar to them as a class.

The Court has rejected the view that the “class” requirement applies only to constitutional officers, not to state officers.⁴⁴⁴ Indeed, the Court has never clearly distinguished the two types of officers. It is clear from the language of the cases that the Court considers a “constitutional officer” to include any office of public trust actually created by the constitution itself.⁴⁴⁵

439. *State Bd. of Health v. Lewis*, 149 So. 2d 41, 43 (Fla. 1963).

440. *Id.*

441. *Id.*

442. The opinion in *State v. Bowman*, 437 So. 2d 1095 (Fla. 1983), at first blush, seems to reach a contrary result; the district court’s opinion primarily affected the Attorney General, a unique office. Moreover, the Attorney General brought the case to the Supreme Court of Florida. *Id.* at 1095. However, *Bowman* involved a question of whether a particular duty fell to the Attorney General or to the various state attorneys throughout Florida. *Id.* at 1096. Thus, there was a “class” of constitutional officers whose duties were at stake. *Id.* *Bowman* may be significant in that sense because the district court’s opinion had determined that the duty in question fell to the Attorney General, not to the State Attorneys. *Id.* Thus, *Bowman* tacitly recognizes jurisdiction where the district court’s decision holds that the “class” of officers has no duty to act in a particular situation. *Bowman*, 437 So. 2d at 1096. *Bowman* is also significant in that it tacitly recognizes jurisdiction even where the petition for review is not brought by a member of the affected class—a conclusion supported by other cases. *Id.*; see *Order on Prosecution of Criminal Appeals*, 561 So. 2d at 1130.

443. *Lewis*, 149 So. 2d at 43.

444. See *Larson v. Harrison*, 142 So. 2d 727, 728 (Fla. 1962) (Drew, J., concurring specially).

445. *E.g.*, *Skitka v. State*, 579 So. 2d 102 (Fla. 1991) (stating that public defenders, created by Article V, section 18 of the Florida Constitution are constitutional officers); *Ramer v. State*, 530 So. 2d 915 (Fla. 1988) (stating that sheriffs, created by Article VIII, section 8(1)(d) of the Florida Constitution are constitutional officers); *Bystrom v. Whitman*, 488 So. 2d 520 (Fla. 1986) (stating that property appraisers, created by the Article VIII, section 1(d) of the Florida Constitution are constitutional officers); *Jenny v. State*, 447 So. 2d 1351 (Fla. 1984) (stating that state attorneys, created by the Article V, section 17 of the Florida Constitution are constitutional officers); *Taylor v. Tampa Elec. Co.*, 356 So. 2d 260 (Fla. 1978) (stating that clerks of the circuit court, created by the Article VIII, section 1(d) of the Florida Constitution are constitutional officers).

But it is apparently insufficient that the officer or entity is merely named in the constitution in an indirect or general way.⁴⁴⁶

The term "state officer" remains somewhat vague. It apparently does not include purely local entities not created by the constitution itself,⁴⁴⁷ but beyond that, the Court has said little. There has been no definitive statement that all local officials and entities are excluded if they fail to qualify as constitutional officers. A good argument can be made that a "class of state officers" should include offices of trust created by statute and authorized to independently exercise identical powers of government as part of some larger statewide scheme.⁴⁴⁸ Examples might include the governing boards of Florida's water management districts.⁴⁴⁹ However, this is an issue that remains undecided.

Finally, dicta theoretically might constitute a basis for exercising this type of jurisdiction. But in practice, the prerequisites for review here are so rigorous that dicta rarely would appear to qualify. Dicta by definition is not binding,⁴⁵⁰ and a petitioner presumably would need to show some real likelihood that the dicta could be enforced against the "affected" class. A detailed and scholarly court opinion, for example, sometimes might pose such a threat. Otherwise, there would be no actual legal effect on a class of constitutional or state officers, and thus no discretion to hear the case.

446. For example, the Florida Constitution mentions "municipal legislative bodies." FLA. CONST. art. VIII, § (2)(b). Yet, the case law indicates that a city official is not a constitutional or state officer. *Estes v. N. Miami Beach*, 227 So. 2d 33, 34 (Fla. 1969).

447. *Estes*, 227 So. 2d at 34; *Hakam v. Miami Beach*, 108 So. 2d 608 (Fla. 1959) (holding that a police officer is not a constitutional or state officer).

448. The Florida Constitution juxtaposes "constitutional officers" with "state officers." If a constitutional office is one created by the constitution, then it is reasonable to say that a state office is one created by statute. The "class" requirement obviously suggests that the office must exist in more than one location throughout the state. Unique local offices would not qualify. Finally, the rationale for exercising jurisdiction over a constitutional class of officers applies with equal force to a statutory class of officers; a district court opinion affecting either class could result in serious disruption of governmental services, requiring resolution by the state's highest court. On the whole, both the language of the constitution and public policy considerations support jurisdiction over a statutory class of officers that meet the other criteria.

449. See FLA. STAT. §§ 373.069-373.073 (2004) (creating districts and governing boards).

450. See *Watson Realty Corp. v. Quinn*, 452 So. 2d 568, 569 (Fla. 1984) (stating that language in a previous case was simply obiter dicta and should not be relied upon as case authority).

D. *Express and Direct Conflict*

By far the largest and most disputatious subcategory is jurisdiction premised on express and direct conflict,⁴⁵¹ usually called simple “conflict jurisdiction.”⁴⁵² Jurisdiction of this type exists where the decision of the district court expressly and directly conflicts with a decision⁴⁵³ of another district court of appeal or of the Supreme Court of Florida on the same question of law.⁴⁵⁴ This relatively straightforward statement has taken on great complexity in practice. Conflict jurisdiction also is the subcategory most affected by the somewhat arcane, but critical distinction between “jurisdiction” and “discretion.”⁴⁵⁵

Historically, the 1980 jurisdictional reforms had one of the greatest effects on this type of jurisdiction. Prior to the amendments, a much broader form of conflict jurisdiction existed in practice. It had come into existence in 1965 when a divided Supreme Court of Florida held that conflict jurisdiction could exist over decisions affirming the trial court without opinion, in which the entire opinion usually said nothing but “per curiam” and was affirmed.⁴⁵⁶ These opinions often are identified by the acronym “PCA.”⁴⁵⁷ Obviously, the determination of “conflict” in such cases only could be made by looking at the record, and not from a review of the opinion under review. By definition, a PCA establishes no precedent beyond the specific case, and Supreme Court of Florida review thus was believed by many to be of questionable utility. Through the years, the ability to review PCAs grew increasingly onerous and was sternly criticized, even by members of the Court.⁴⁵⁸ The criticisms, along with the Court's overburdened docket, led directly to the 1980 constitutional reforms and the end of review for PCAs.⁴⁵⁹

451. FLA. CONST. art. V, § 3(b)(3).

452. The term “conflict jurisdiction” is almost never used by the Court to refer to “certified conflict,” which is a separate subcategory. See discussion *infra* Part VI.F.

453. In a case that preceded the 1980 amendments to Article V, the term “decision” was held to include both the judgment and opinion for purposes of the Supreme Court of Florida's jurisdiction over “decisions.” *Seaboard Air Line R.R. v. Branham*, 104 So. 2d 356, 358 (Fla. 1958).

454. FLA. CONST. art. V, § 3(b)(3).

455. See discussion *supra* Part III.A.

456. See *Lake v. Lake*, 103 So. 2d 639 (Fla. 1958), *overruled by* *Foley v. Weaver Drugs, Inc.*, 177 So. 2d 221 (Fla. 1965).

457. PCAs should be distinguished from “per curiam” opinions issued by the Supreme Court of Florida, which are very different in nature. See discussion *supra* Part II.D.

458. E.g., *Fla. Greyhound Owners & Breeders Ass'n v. W. Flagler Assocs.*, 347 So. 2d 408, 410–12 (Fla. 1977) (England, J., concurring).

459. See *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980).

1. The Elements of Obtaining Conflict Review

As a result of the 1980 reforms and the cases construing them, the Court potentially has conflict jurisdiction only over a district court decision containing at least a statement by a majority⁴⁶⁰ or a majority citation to authority.⁴⁶¹ Petitions seeking jurisdiction are brought to the Justices and at least four of them, a majority of the Court, are required to accept or deny jurisdiction.

The Court's determination of jurisdiction is constrained by the "four-corners" rule: conflict must "appear within the four corners of the majority decision" brought for review.⁴⁶² There can be no examination of the record, no second-guessing of the facts stated in the majority decision, and no use of extrinsic materials to clarify what the majority decision means. Dissenting or concurring opinions in the district court cannot supplement what is left unstated in the majority opinion. Moreover, the Court has strictly applied the four-corners rule even after a 2002 amendment to the *Florida Rules of Appellate Procedure*⁴⁶³ that authorized attorneys, as part of their motions for rehearing in the district courts, to request that the lower court withdraw a PCA and replace it with an opinion that potentially would be reviewable by the Supreme Court of Florida.⁴⁶⁴ The Court held that the four-corners rule still must be applied despite the changed *Florida Rules of Court*.⁴⁶⁵ In the vast majority of cases, the Court strictly honors the four-corners rule, though there may be rare cases difficult to square with it.

Within the constraints of the four-corners rule, review will be allowed only if the following questions are all answered in the affirmative: 1) does jurisdiction actually exist; 2) does discretion exist; and 3) is the case significant enough to be heard. The three elements are easy to see in some types of cases, but are harder to see in others.

460. The court has held that discussion of the "legal principles which the court applied supplies a sufficient basis for a petition for conflict review." *Ford Motor Co. v. Kikis*, 401 So. 2d 1341, 1342 (Fla. 1981). There is no requirement that the district court opinion must explicitly identify conflicting decisions. *Id.*

461. *See Jollie v. State*, 405 So. 2d 418, 420 (Fla. 1981).

462. *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986). Here, the Court clearly is using the term "decision" to encompass both the result and the entire opinion. *Accord Seaboard Air Line R.R. v. Branham*, 104 So. 2d 356, 358 (Fla. 1958).

463. Amendment to Fla. Rules of App. Proc., 827 So. 2d 888 (Fla. 2002).

464. *R.J. Reynolds Tobacco Co. v. Kenyon*, 882 So. 2d 986, 988-89 (Fla. 2004).

465. *Id.*

a. *Does Jurisdiction Exist?*

The most obvious effect of the 1980 reforms was to eliminate completely the Court's jurisdiction over PCAs—those decisions issued without statement or citation. If a PCA includes no statement by a majority and no majority citation to authority, then the Court completely lacks jurisdiction to review the case.⁴⁶⁶ This is a fact of great importance for attorneys who wish to seek further appellate review of PCA decisions, because it means that the only possible appeal is to the United States Supreme Court.⁴⁶⁷ Statements in a separate opinion, whether dissenting or concurring, are not sufficient if there is no majority statement or citation.⁴⁶⁸

It deserves to be stressed that the Court has held that jurisdiction is completely absent in these cases; it is not that the Court simply will not exercise discretion to hear the cause.⁴⁶⁹ As a consequence, the Clerk of the Court has been authorized by the Court to issue a form summary denial in most cases brought for review to the Court based on a PCA that lacks a majority statement or citation to authority. The Justices and their staffs do not review these petitions, thus filing them is a complete waste of time, resources, and money, especially client money.

The case law has established only one other category of district court opinions over which the Court may lack conflict jurisdiction as a matter of law.⁴⁷⁰ These are PCAs that contain nothing but a citation to authority (called "citation PCAs"). In 1988, the Court distilled much of its earlier law on this question into a single formula. In *Florida Star v. B.J.F.*,⁴⁷¹ the Court said that there is no jurisdiction over a citation PCA unless "one of the cases cited as controlling authority is pending before this Court, or has been reversed on appeal or review, or receded from by this Court, or unless the citation explicitly notes a contrary holding of another district court."⁴⁷² As noted earlier, the failure of the district court opinion to meet any of these requirements forecloses the possibility of jurisdiction in the Court, and attempts to

466. *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980).

467. *See Fla. Star v. B.J.F.*, 530 So. 2d 286 (Fla. 1988).

468. *Id.*

469. *Id.* at 288 n.3. In other words, any further appeal from a PCA issued without a majority statement or citation can be had only in the United States Supreme Court, in its discretion. Attempting to bring the case for review in the Supreme Court of Florida may have the effect of barring an appeal to the United States Supreme Court, because the time to file the appeal most likely will be consumed. *Id.*

470. Theoretically there could be another: PCAs that contain only a statement insufficient to establish a point of law, without citation.

471. 530 So. 2d at 286.

472. *Id.* at 288 n.3 (citing *Jollie v. State*, 405 So. 2d 418, 420 (Fla. 1981)).

assert jurisdiction in such cases can have significant consequences when further appeal may be sought in the United States Supreme Court.⁴⁷³

As is apparent from the language quoted here, the citation to authority must be to a case⁴⁷⁴ issued by a Florida district court of appeal or by the Supreme Court of Florida.⁴⁷⁵ A citation to a statute, administrative, or other rule, federal case, or case from another jurisdiction is insufficient to establish discretion for review. There is no jurisdiction, for example, where the alleged conflict is between the decision below and a *Florida Rule of Court*.⁴⁷⁶

On the other hand, jurisdiction exists if there is any notation in a citation PCA (or any other type of opinion, for that matter) of contrary case law issued by another district court of appeal or the Supreme Court of Florida.⁴⁷⁷ This may be as simple as a citation beginning with the signals “contra” or “but see,”⁴⁷⁸ because they indicate contradiction. A citation beginning with “but cf.” may be insufficient⁴⁷⁹ because the signal indicates contradiction only by analogy,⁴⁸⁰ which may not meet the constitutional requirement of “direct” conflict.⁴⁸¹

Further, citation to a case from the same district court of appeal can establish jurisdiction only if that case is pending for review in or has been reversed by the Supreme Court of Florida.⁴⁸² Thus, a conflicting opinion or a “contra” or “but see” citation to an opinion of the same district court would not in itself establish conflict. This rests on a simple rationale. The fact that a district court decides to expressly or silently depart from its own case law does not establish conflict, because there is no such thing as “intradistrict

473. See discussion *supra* Part III.A.3.

474. *Fla. Star*, 530 So. 2d at 288 n.3 (citing *Jollie*, 405 So. 2d at 420).

475. FLA. CONST. art. V, § 3(b)(3).

476. *Allstate Ins. Co. v. Langston*, 655 So. 2d 91, 93 n.1 (Fla. 1995).

477. See *Stevens v. Jefferson*, 436 So. 2d 33, 34 (Fla. 1983), *aff’d* 408 So. 2d 634 (Fla. 5th Dist. Ct. App. 1981). A district court may seem foolish recognizing contrary authority from the Supreme Court of Florida, but this sometimes happens with good reason. In *Watson Realty Corp. v. Quinn*, 435 So. 2d 950 (Fla. 1st Dist. Ct. App. 1983), the First District Court of Appeal noted that it was departing from dicta issued by the Supreme Court of Florida in *Canal Auth. v. Ocala Mfg., Ice, & Packing Co.*, 435 So. 2d 950 (Fla. 1st Dist. Ct. App. 1983) (citing *Canal Auth. v. Ocala Mfg., Ice & Packing Co.*, 332 So. 2d 321, 327 (Fla. 1976)). The district court believed the dicta to be incorrect, and the Supreme Court of Florida later agreed. *Watson Realty Corp. v. Quinn*, 452 So. 2d 568 (Fla. 1984).

478. See *Frederick v. State*, 472 So. 2d 463, 464 (Fla. 1985), *aff’d* 472 So. 2d 463 (1985).

479. Such citations are rare. See, e.g., *Cherry v. State*, 618 So. 2d 255 (Fla. 1st Dist. Ct. App. 1993); *Phelps v. State*, 368 So. 2d 950 (Fla. 2d Dist. Ct. App. 1979). No further review was taken in either of these cases.

480. See THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION, R. 1.2(c), at 23 (Columbia Law Review Ass’n et al. eds., 17th ed. 2000).

481. FLA. CONST. art. V, § 3(b)(3).

482. *Jollie v. State*, 405 So. 2d 418, 420 (Fla. 1981).

conflict” as a basis for supreme court jurisdiction. The latest inconsistent opinion is deemed to overrule the earlier.⁴⁸³

Often, a citation PCA may include a parenthetical statement that conflict exists. The statement can establish jurisdiction only if it is accurate⁴⁸⁴ and identifies a specific decision of another district court or the Supreme Court of Florida as the basis for conflict. But when this happens, it is possible that jurisdiction may exist on a completely independent basis—the Court’s separate “certified conflict” jurisdiction, discussed below.⁴⁸⁵ The possibility always should be considered, because “certified conflict” jurisdiction may be easier to obtain, though not always.⁴⁸⁶

b. *Does Discretion Exist?*

Except for PCAs that fail to meet the criteria outlined above, the Supreme Court of Florida technically has potential jurisdiction to review all other district court opinions. However, the Court may still lack discretion to hear the particular case.⁴⁸⁷ As noted earlier, the distinction between “jurisdiction” and “discretion” is somewhat arcane and in many instances really is relevant only in determining the time to bring appeals to the United States Supreme Court. So, in common usage, lawyers and Justices often tend to speak of both under the rubric “jurisdiction,” although this technically is incorrect.

Nevertheless, in 1988, the Court indicated that, apart from the special rules governing PCAs, the problem of “conflict” involves a constitutional limit on the Court’s discretion to hear a case rather than a limit on jurisdiction.⁴⁸⁸ If there is no conflict, then there is no discretion, and the petition for review must be denied or dismissed on that basis.⁴⁸⁹ Thus, the existence of conflict is an absolute prerequisite for a review.⁴⁹⁰ In addition, conflict cannot be “derivative.” It is insufficient that a decision cites as controlling authority a completely separate decision that supposedly is in conflict with a

483. *State v. Walker*, 593 So. 2d 1049, 1049–50 (Fla. 1992) (citing *Little v. State*, 206 So. 2d 9, 10 (Fla. 1968)).

484. The accuracy requirement arises from the plain language of the constitution that there must be express and direct conflict appearing on the face of the decision below. FLA. CONST. art. V, § 3(b)(3). The fact that the parties assert conflict in their jurisdictional briefs will not supply this requirement, even if both parties erroneously conclude that conflict exists.

485. See discussion *infra* Part VI.F.

486. See *id.*

487. *Fla. Star v. B.J.F.*, 530 So. 2d 286, 288–89 (Fla. 1988).

488. *Id.* at 288

489. *Id.*

490. *Id.*

third decision,⁴⁹¹ unless some other basis for jurisdiction exists. In other words, there is no such thing as “daisy-chain” conflict.

The jurisdiction/discretion distinction has prompted “creative” efforts to expand conflict jurisdiction, which the Court consistently has declined. After *Florida Star* established the distinction, some parties seized upon language in that opinion to argue that conflict jurisdiction can be merely “hypothetical.”⁴⁹² This was a misreading of the opinion of *Florida Star* and a misapprehension of the difference between “jurisdiction” and “discretion.”⁴⁹³

In *Florida Star*, the Court said that jurisdiction exists if a district court decision contains any statement or citation that “hypothetically could create conflict if there were another opinion reaching a contrary result.”⁴⁹⁴ However, discretion is still limited by the conflict or “opinion reaching a contrary result” requirement.⁴⁹⁵ In other words, a petitioner still must establish that discretion to hear the case genuinely exists. Any petition arguing “hypothetical conflict” alone without establishing actual conflict would fail to establish the Court’s discretion to take the case.

In a larger sense, the overriding purpose of conflict review remains the elimination of inconsistent views within Florida about the same question of law.⁴⁹⁶ But this does not necessarily mean the Court can review a case only when necessary to resolve a conflict of holdings. Many conflict cases accepted by the Court fall within this last grouping, but not all do. Part of the reason is that a genuine “conflict” also can be manifested in more than just a holding. The result is that several types of conflict have been recognized. In actual practice, the Court tends to accept cases that fall into four broad and sometimes overlapping categories: (i) “holding conflict;” (ii) “misapplication conflict;” (iii) apparent conflict; and (iv) “piggyback conflict.”

(i) “Holding Conflict”

The most obvious conflict cases involve “holding conflict.” The majority opinion below contains a holding of law that is in irreconcilable conflict with a holding of law in a majority opinion of another district court or of the Supreme Court of Florida. In other words, there is an actual conflict of con-

491. *Dodi Publ’g Co. v. Editorial Am., S.A.*, 385 So. 2d 1369, 1369 (Fla. 1980).

492. *Fla. Star*, 530 So. 2d at 288.

493. *See id.*

494. *Id.*

495. *See id.*

496. *E.g.*, *Wainwright v. Taylor*, 476 So. 2d 669, 670 (Fla. 1985); *see* FLA. CONST. art. V, § 3(b)(3).

trolling, binding precedent. Where this is true, conflict jurisdiction unquestionably exists.

For example, a district court in 1992 issued an opinion expressly applying the doctrine of interspousal immunity in a particular case.⁴⁹⁷ While review was pending, the Supreme Court of Florida issued an opinion in another case holding that the doctrine of interspousal immunity no longer existed in Florida.⁴⁹⁸ Hence, these two opinions were in actual and irreconcilable conflict with one another, because the holding of one could not stand if the other was correct.

Conflict is not always so plain as this example, however. In many instances, the cases in question may be factually distinguishable to a greater or lesser extent, and these distinctions may be critical to a conflict analysis. As a result, the “holding conflict” category probably should not be considered entirely discrete from other categories. “Holding conflict” sometimes may blur into the next two kinds of conflict, which themselves are not entirely distinct.

(ii) “Misapplication Conflict”

A separate kind of conflict occurs when the decision of the district court misapplies controlling precedent.⁴⁹⁹ “Misapplication conflict” thus is not precisely the same as “holding conflict,” because the cases involved are distinguishable. The conflict arises because the district court has failed to distinguish the cases properly. In other words, no conflict would have existed had controlling precedent been properly construed. Though sometimes controversial even among members of the Court,⁵⁰⁰ it has been used time and again. “Misapplication conflict” usually comes in three varieties: “erroneous reading” of precedent, “erroneous extension” of precedent, and “erroneous use” of facts.

“Erroneous reading” cases are perhaps the most clearly justifiable of the three because they involve the purely legal problem of whether the controlling law was properly stated. Thus, they verge on being “holding conflict” cases. For example, in 1982, the Court confronted a case in which the district court first had misinterpreted controlling precedent on awards of puni-

497. *McAdam v. Thom*, 610 So. 2d 510, 512 (Fla. 3d Dist. Ct. App. 1992), *quashed by Thom v. McAdam*, 626 So. 2d 184 (Fla. 1993).

498. *Waite v. Waite*, 618 So. 2d 1360, 1361 (Fla. 1993).

499. *E.g.*, *Acensio v. State*, 497 So. 2d 640, 641 (Fla. 1986).

500. *Knowles v. State*, 848 So. 2d 1055, 1059 (Fla. 2003) (Wells, J., dissenting) (expressing considerable doubt over whether misapplication conflict has a valid constitutional basis).

tive damages and then had applied the misinterpretation to the case.⁵⁰¹ The Court accepted jurisdiction expressly because of misapplication conflict.⁵⁰² This was not precisely a "holding conflict" case, however. Two dissenting Justices argued that the district court actually read the precedent correctly.⁵⁰³ In other words, misapplication was not necessarily clear until the Court's majority decided the matter and construed the precedent.

"Erroneous extension" cases are those in which the district court may correctly state a rule of law, but then proceeds to apply the rule to circumstances for which it was not intended. In other words, the district court stated the law correctly and framed the facts accurately, but it should never have linked the two. This type of conflict is easily masked as some other type of conflict, and for that reason is seldom expressly identified in opinions. The existence of the "erroneous extension" is sometimes noted in opinions dissenting to a denial of jurisdiction.⁵⁰⁴ Prior to 1980, the Court expressly recognized "erroneous extension" as a valid basis of conflict jurisdiction.⁵⁰⁵

"Erroneous use" cases are those in which the district court misapplies a rule of law based on its own misperception of the facts.⁵⁰⁶ This is the most troublesome form of misapplication conflict, because it often tests the strength of the four-corners rule. Sometimes the factual error may be evident on the face of the opinion, but often it is not. For example, in 1985, the Court accepted jurisdiction in a case where the district court had "overlooked" a relevant factual finding of the trial court.⁵⁰⁷ Although controlling law was stated properly, the district court's opinion improperly applied the law because it failed to consider the overlooked finding.⁵⁰⁸

The discretion to review such cases really may be justifiable where the factual error is apparent within the four corners of the opinion being reviewed.⁵⁰⁹ In *State v. Stacey*,⁵¹⁰ for example, the district court opinion did in

501. *Arab Termite & Pest Control of Fla., Inc. v. Jenkins*, 409 So. 2d 1039, 1040 (Fla. 1942).

502. *Id.*

503. *Id.* at 1043 (Sundberg, C.J., dissenting, joined by Adkins, J.).

504. *E.g.*, *Salser v. State*, 613 So. 2d 471, 473 (Fla. 1993) (Kogan, J., dissenting).

505. *Sacks v. Sacks*, 267 So. 2d 73, 75 (Fla. 1972).

506. *E.g.*, *Acensio*, 497 So. 2d at 641.

507. *State v. Stacey*, 482 So. 2d 1350, 1351 (Fla. 1985).

508. *Id.*

509. The court elsewhere has said that in determining conflict there can be no consideration of facts outside the four corners of the opinion. *E.g.*, *Hardee v. State*, 534 So. 2d 706, 708 (Fla. 1988).

510. 482 So. 2d 1350 (Fla. 1985).

fact “overlook” the relevant finding.⁵¹¹ However, at best, the possibility of the error could be inferred from the district court opinion, but the facts stated therein were not complete enough to make the error apparent. “Inferential” factual error is a very slim reed to support a finding of express and direct conflict,⁵¹² and the justification for review becomes questionable if the existence of the error cannot be inferred from material contained within the four corners of the district court opinion. Thus, the Court may have overlooked the four-corners rule in accepting jurisdiction, and the case is probably best understood as marginal for purposes of precedent.

From the case law it appears that all instances of “misapplication conflict” expressly noted in the jurisdictional statement of opinions have involved the misapplication of Supreme Court of Florida decisions, not those of the district courts.⁵¹³ The unanswered question is whether “misapplication conflict” of district court decisions even exists. It may be that such cases are simply being analyzed as something other than misapplication cases, at least where the district court does not directly announce that it is applying the law set forth in an opinion of a separate district court. In any event, the reasons for permitting “misapplication conflict” are a little different if there is an obvious conflict caused by a misapplication of controlling law. That would be most clear where the district court opinion being misapplied itself merely restated law already established in Supreme Court of Florida opinions.⁵¹⁴

Where the “misapplied” district court opinion establishes a new point of law, however, the rationale becomes strained. This is because the Florida Supreme Court first must construe the new point of law in order to find that it has been “misapplied,” which raises the possibility that the Court’s construction may extend beyond what the district court intended. In other words, a question would exist as to exactly which court has committed the misapplication. On the whole, this argues against the Supreme Court of Florida extending conflict jurisdiction to this narrow category of cases, especially where the decision brought for review expressly declares that it is applying a new point of law established by another district court. At least in that instance, the two holdings are the same and uniformity is maintained. In

511. *Id.* at 1351.

512. *See* Dep’t of Health & Rehab. Servs. v. Nat’l Adoption Counseling Serv., Inc., 498 So. 2d 888, 889 (Fla. 1986) (holding conflict cannot be inferred or implied).

513. *E.g.*, Knowles v. State, 848 So. 2d 1055, 1058 (Fla. 2003); Robertson v. State, 829 So. 2d 901, 904 (Fla. 2002).

514. The four-corners rule applies to the decision brought for review. There is no similar restriction affecting the separate opinions with which it is in conflict, though attorneys would be wise in their jurisdictional briefs to rely on conflict with Supreme Court cases when arguing misapplication conflict jurisdiction.

such an instance, it is difficult to say conflict is evident within the four corners of the opinion brought for review if that opinion says precisely the contrary, unless some other basis for jurisdiction exists.

Finally, a case may involve an alleged misapplication of dicta. In 1984, the Court accepted a case based on conflict with dicta in a prior Supreme Court of Florida opinion, although the Court overruled the dicta rather than the district court's decision.⁵¹⁵ If "dicta conflict" existed in that context, it probably also could exist as a form of misapplication conflict. "Dicta conflict" may be justified in light of the fact that the Court previously suggested that its jurisdiction over "decisions" can rest on anything in a written opinion, not merely a judgment or result.⁵¹⁶ For example, a scholarly opinion may make broad statements of law that are actually dicta, yet these statements express an opinion about some legal point. Later a district court could conceivably find the dicta persuasive but then misapply it. In such a situation, all the reasons justifying review of misapplication conflict also apply, and review would be warranted to the extent the misapplication may create confusion in the law or reach an incorrect or unfair result.

(iii) "Apparent Conflict"

Another category is "apparent conflict," arising when a district court opinion only seems to be in conflict, even though there actually may be some reasonable way to reconcile it with the case law. A cramped or overly strict reading of the constitution might suggest that discretion should not be allowed here.⁵¹⁷ However, such an approach would ignore a very real problem. Until the Supreme Court of Florida harmonizes cases that seem to be in conflict, for all intents and purposes, there is an actual conflict.

Moreover, it would not appear to be sound policy to deprive the Court of discretion merely because there is some way to harmonize cases without overruling any of them. This amounts to saying that the Court, in conflict cases, can review only if it negates, which will not always be desirable policy. The authority to review and harmonize decisions when appropriate would appear to be a legitimate and effective means for the Court to address the issue of uniformity of the law. The Supreme Court of Florida should not be forced either to decline jurisdiction or overrule essentially sound decisional law whose relation to other cases is simply uncertain.

515. *Watson Realty Corp. v. Quinn*, 435 So. 2d 950, 950 (Fla. 1st Dist. Ct. App. 1983).

516. *Seaboard Air Line R.R. Co. v. Branham*, 104 So. 2d 356, 358 (Fla. 1958).

517. *See* FLA. CONST. art. V, § 3(b)(3).

In any event, review of “apparent conflict” cases is now a well established feature of the Court’s jurisdiction, and it may or may not result in the overruling of precedent from a Florida appellate court. In fact, this review can include “receding” from the Court’s own cases.⁵¹⁸ In 1991, for example, the Court accepted jurisdiction to resolve an “apparent conflict” with overbroad statements of law that it had made in one of its own opinions two years earlier.⁵¹⁹ The Court ultimately receded from those statements, but without actually reversing the result it previously had reached; and the Court approved the district court’s decision, harmonizing the cases and eliminating the apparent conflict.⁵²⁰

“Apparent conflict” sometimes may arise from a prior district court opinion simply lacking in precision. In 1988, for example, the Court accepted a case for review based on “apparent conflict” with an earlier district court opinion that had not set out sufficient facts in order to determine whether the ruling was correct.⁵²¹ In that sense, the earlier case could be considered overbroad, but was not necessarily so, depending on the facts. The Supreme Court of Florida resolved the “apparent conflict” by disapproving the earlier case “only to the extent that it may be inconsistent with [a correct and complete statement of the relevant law].”⁵²² In a similar case, the Court said that conflict may exist if a rule of law is stated so vaguely or imprecisely as to create a “fair implication” of conflict.⁵²³

(iv) “Piggyback Conflict”

The final category of conflict is “piggyback conflict.” Discretion over these cases arises because they cite as controlling precedent a decision of a district court that is pending for review in, or has been subsequently overruled by, the Florida Supreme Court; or they cite as controlling precedent a decision of the Florida Supreme Court from which the Court has subse-

518. “Recede” is the term of art used when the Court overrules its own decisions in whole or in part.

519. *Pub. Health Trust of Dade County v. Menendez*, 584 So. 2d 567, 568 (Fla. 1991).

520. *Id.* at 569–70.

521. *D’Oleo-Valdez v. State*, 531 So. 2d 1347, 1348 (Fla. 1988).

522. *Id.*

523. *Hardee v. State*, 534 So. 2d 706, 708 (Fla. 1988). These examples also demonstrate applications of the four-corners rule: the Court should confine its determination to the four corners of the conflicting district court opinions, making no attempt to review the record in the earlier district court. The decision whether discretion exists must be made based on the facts as stated in the four corners of the “conflicting” opinions, though these may be numerous. *Id.*

quently receded.⁵²⁴ A considerable number of cases falling within this category, but not all, are citation PCAs. The district courts sometimes issue lengthy opinions resting on precedent that is currently pending review in the Florida Supreme Court or precedent that is later overruled.

There are good reasons for allowing this type of discretion. For example, the lower appellate courts often have a large number of cases before them dealing with the same legal issue. To save both time and resources, one case may be selected as the "lead case" to be decided with a full opinion, while the others are resolved in short opinions that often do little more than cite to the decision in the lead case. Logic and fairness would dictate that the Court has discretion to review the lead case along with its "companion" cases. For this reason, the Court accepts the bulk of "piggyback" cases for review, though these may be handled as no request cases or disposed of by order.⁵²⁵

It is worth noting, however, that "piggyback conflict" by definition would not exist for the "lead" case in this example. "Piggyback conflict" exists only if a decision cited as controlling precedent already has gotten inside the courthouse door on some other jurisdictional basis, or the decision has been disapproved or receded from.

There may be another problem: "piggyback conflict" sometimes may be only an inchoate, unrealized possibility at the time when review must be sought. For example, the Florida Supreme Court may be uncertain for a time whether it will accept a lead case for review. Perhaps the Justices are uncertain as to whether they have discretion to hear it. During the interim, jurisdiction remains inchoate and only a possibility.

In such instances, the Court typically follows a practice of postponing its decision on jurisdiction while sometimes permitting parties to brief the substantive issues in the interim.⁵²⁶ However, once the lead case is accepted for review, the companion cases may be accepted, except on some occasions when "piggyback" cases actually reached the correct result. Of course, a denial of jurisdiction in the lead case may eliminate the possibility of "piggyback" jurisdiction, meaning that review will be declined in the companion cases unless some other basis for jurisdiction exists.

524. Fla. *Star v. B.J.F.*, 530 So. 2d 286, 288 n.3 (Fla. 1988) (citing *Jollie v. State*, 405 So. 2d 418, 420 (Fla. 1981)).

525. See discussion *supra* Part II.B.2.

526. FLA. R. APP. P. 9.120(e)-(f).

c. *Is the Case Significant Enough?*

The final element in obtaining review of a conflict case is a showing that the issues are significant enough for the Court to exercise its discretion. Often the importance or lack of significance of the decision is obvious to everyone. At other times, a decision may seem trivial at first blush, yet in fact involve a potential for serious disruption. For that reason, persons trying to invoke the Court's conflict jurisdiction are well advised to also explain why the case is important enough to be heard. It is always important to realize that conflict jurisdiction is discretionary. Even if discretion exists, the Court is free to deny the petition if the issues seem unimportant or the result is essentially fair or correct,⁵²⁷ among other reasons.

It is worth noting that the act of accepting review based on conflict vests the Court with power to hear every issue in the case, not merely the conflict issues.⁵²⁸ As a result, these "nonconflict" issues sometimes may weigh with the Court in deciding whether to accept review. However, the fact that these issues may seem important will not cure a lack of conflict or act as a substitute for it. Finally, the Court has absolute discretion not to address nonconflict issues.⁵²⁹ By doing so, the Court does not establish precedent regarding these issues.

2. Briefing on Conflict Jurisdiction

For parties to invoke the Court's conflict jurisdiction, they must file jurisdictional briefs with the Court. The *Rules of Court* limit these briefs to ten pages.⁵³⁰ The most persuasive briefs on conflict jurisdiction are short and make their points with direct, plain language. If conflict truly exists, all the brief need do, in most instances, is quote the law from the district court opinion and the law from the allegedly conflicting opinion, and then explain the importance of the case. For "piggyback" jurisdiction, it is sufficient and imperative to expressly note the fact that a case cited in the district court opinion is pending review or has been disapproved or receded from.

527. See *Wainwright v. Taylor*, 476 So. 2d 669, 670–71 (Fla. 1985) (petition dismissed in the interests of judicial economy where outcome would not be different and where erroneous statement of law had been corrected by other means).

528. *Bankers Multiple Line Ins. Co. v. Farish*, 464 So. 2d 530, 531 (Fla. 1985); *Savoie v. State*, 422 So. 2d 308, 310 (Fla. 1982).

529. See, e.g., *Thom v. McAdam*, 626 So. 2d 184 (Fla. 1993).

530. FLA. R. APP. P. 9.210(a)(5). This rule is strictly enforced, and the Court currently grants no request for an extension of the page limit.

In many cases, the actual point of the jurisdictional brief usually can be established in far less than the ten pages allotted.⁵³¹ Of course, where the existence of conflict is not as clear, a brief must engage in a lengthier and more complex analysis to demonstrate the conflict. Nowhere is brevity and precision more valued than in a jurisdictional brief.

Appendices may consist only of a copy of the decision below and a copy of the alleged conflict cases. Anything else is irrelevant and will be stricken by the clerk's office. Under the four-corners rule, the record cannot be used to establish conflict, and attorneys who ignore this fact do themselves and their clients a disservice. The Court sometimes receives voluminous appendices that obviously required much work and expense to compile, reproduce, and bind. However, such material has no purpose other than adding to the Court's drive to collect recyclable paper.⁵³²

Except for PCAs in which jurisdiction is clearly lacking, nearly all jurisdictional briefs are handled and decided by the Justices. Justices have their staffs prepare brief memoranda summarizing relevant facts and holdings and analyzing the jurisdictional issues. New law clerks and interns frequently are assigned to work on jurisdictional memoranda as their first learning experience at the Court, on the theory that jurisdiction is the first thing a new law clerk or intern must learn.

When the Justices' staffs prepare memoranda on DOJ's, these necessarily must focus on the three questions relevant to conflict cases: 1) does jurisdiction exist; 2) does the Court have discretion to hear the case; and 3) why should the discretion be exercised. As noted earlier, a case can be accepted for review only upon the affirmative vote of at least four Justices, though the decision whether to grant oral argument sometimes can be determined by fewer votes, or by the Chief Justice.

3. Opinion—Writing in Conflict Cases

Conflict cases are randomly assigned and treated the same as other cases for purposes of opinion writing. There is an important point, however, that must be consistently addressed in any opinion in conflict cases. A conflict opinion should do one of three things before it concludes: disapprove a district court decision in whole or in part, recede from a Florida Supreme Court decision in whole or in part, or harmonize cases. This practice arises from the very nature of conflict jurisdiction, which exists only when two or more relevant cases are directly or apparently irreconcilable. Thus, for juris-

531. Sometimes multiple conflicts exist.

532. The Court has instituted a very successful paper recycling program in recent years.

diction to exist, something must be wrong that the Court determines needs “fixing.” Fixing always requires that at least one previous statement of law be overruled or harmonized.

E. *Certified Questions of Great Public Importance*

The next subcategory of discretionary review jurisdiction exists when a decision of a district court passes upon a question certified by it to be of great public importance.⁵³³ Commentators have noted that the operative language essentially was unchanged by the 1980 reforms, although the pre-1980 constitution specified that the question be one of great public “interest.”⁵³⁴ This last change, however, may only have been semantic when the case law under the earlier scheme is examined. Even prior to 1980, certified questions routinely involved important issues in which the general public may actually have had little “interest,” generally speaking.⁵³⁵ So, the requirement of “importance” appears to have existed even before 1980.

At one time, the Justices routinely accepted cases in this category, a historical fact reflected in the rule still in force dispensing with jurisdictional briefs.⁵³⁶ That fact has now changed, though there were hints for many years that this might happen. Some time ago, a Justice argued that certified questions should not be reviewed unless the case involved some minimum level of immediacy.⁵³⁷ That particular view was silently rejected when first made after the 1980 reforms,⁵³⁸ but the general concern underlying it never fully vanished and finally came to full flower in the late 1990s. Even before this change began, the Court had suggested that it would not use its discretion boundlessly. A number of earlier certified questions were treated summarily,⁵³⁹ and the Court showed no unwillingness to characterize a certified question as “irrelevant.”⁵⁴⁰ Moreover, the Court has firmly established that it will not review a certified question that the district court actually failed to pass upon⁵⁴¹ or that was based upon speculative facts.⁵⁴² The rationale for

533. See FLA. CONST. art. V, § 3(b)(4).

534. See *Constitutional Jurisdiction*, *supra* note 3, at 191–92.

535. FLA. R. APP. P. 9.030 (1980 amendment committee notes).

536. FLA. R. APP. P. 9.120(d).

537. Dep’t of Ins. v. Teachers Ins. Co., 404 So. 2d 735, 736–39 (Fla. 1981) (England, J., dissenting as to jurisdiction).

538. See *id.* at 735.

539. *E.g.*, Varney v. State, 659 So. 2d 234, 234 (Fla. 1995).

540. Fawcett v. State, 615 So. 2d 691, 692 (Fla. 1993).

541. Pirelli Armstrong Tire Corp. v. Jensen, 777 So. 2d 973, 974 (Fla. 2001); Gee v. Seidman & Seidman, 653 So. 2d 384, 384–85 (Fla. 1995).

542. State v. Schebel, 723 So. 2d 830, 830 (Fla. 1999).

these last restrictions ultimately is rooted in the sound principle that courts, with limited exceptions, do not give advisory opinions.⁵⁴³

One of the first outright dismissals of a previously accepted certified question of great public importance appeared in 1998, though in a summary form that called little attention to the potentially significant policy shift it represented.⁵⁴⁴ By the following year, the Court was directly expressing misgivings in some certified questions. In one case accepted for review, the Court noted that the certified question “appears to be more of a request for our approval of the conclusion reached by the court below,” something the Court expressly discouraged.⁵⁴⁵ In *State v. Sowell*⁵⁴⁶ and *Dade County Property Appraiser v. Lisboa*,⁵⁴⁷ the Court finally dismissed certified questions in unvarnished terms.⁵⁴⁸ The Court in *Sowell* found that the question presented affected “an extremely narrow principle of law, and, as phrased, [did] not present an issue of ‘great public importance.’”⁵⁴⁹ The vote to dismiss jurisdiction as improvidently granted was unanimous, with all Justices participating.⁵⁵⁰ Likewise, in *Lisboa*, the Court dismissed a certified question involving what it described as “a narrow issue with very unique facts.”⁵⁵¹

While in the past the Court would routinely accept jurisdiction even if it followed with a summary disposition,⁵⁵² it now had established a principle obvious in the constitutional grant of jurisdiction: it could decline to review such cases, in its discretion, if they do not meet some minimum threshold. This shift came apace with other opinions restricting review in some cases in which a district court certified conflict with another state appellate case⁵⁵³ and in cases involving “pass-through” jurisdiction.⁵⁵⁴ All appeared to be based on the same policy concerns and occurred during the same time in which both the Court’s caseload and the complexity of its cases were increasing.⁵⁵⁵ These circumstances, combined with the obvious reluctance of

543. *Id.*; see discussion *supra* Part IV.

544. *State v. Thompson*, 721 So. 2d 287, 287 (Fla. 1998).

545. *Owens-Corning Fiberglas Corp. v. Ballard*, 749 So. 2d 483, 485 n.3 (Fla. 1999).

546. 734 So. 2d 421 (Fla. 1999).

547. 737 So. 2d 1078 (Fla. 1999).

548. *Sowell*, 734 So. 2d at 422; *Lisboa*, 737 So. 2d at 1078.

549. *Id.*

550. *Id.*

551. *Lisboa*, 737 So. 2d at 1078. The vote in *Lisboa* was five to one. *Id.*

552. *E.g.*, *Fawcett v. State*, 615 So. 2d 691, 692 (Fla. 1993).

553. See discussion *infra* Part VI.F.

554. See discussion *infra* Part VI.G.

555. See THE OFFICE OF THE STATE COURT ADMINISTRATOR, WORKLOAD OF THE SUPREME COURT OF FLORIDA 54 (2000), http://www.floridasupremecourt.org/pub_info/workload/workloadcomplete.pdf (last visited Mar. 12, 2005) [hereinafter WORKLOAD].

the Court to use resources on relatively minor legal issues,⁵⁵⁶ have combined to produce a new threshold for review.

The exact nature of this threshold will continue to be fleshed out in future cases. At present, however, the discernible rule is that the Court will not necessarily review questions certified to be of great public importance if they involve narrow issues or unique facts, or both, thus supporting a conclusion that the certified question is not actually of great public importance.⁵⁵⁷ Although much of the case law after 1999 contains no discussion of why the certified question is being dismissed,⁵⁵⁸ other cases focus on the existence of narrow issues and unique facts.⁵⁵⁹ In that regard, the exact phrasing of the question by the district court may be of crucial importance, a conclusion suggested by the language of *Sowell*.⁵⁶⁰ The Court indicated years earlier, for example, that jurisdiction is “particularly applicable” to cases of first impression,⁵⁶¹ perhaps implying a greater presumption that review should be granted.

Other points deserve mention. The decision to certify falls within the “absolute discretion” of the district court,⁵⁶² and thus cannot be required or undone by the Supreme Court of Florida. It is not sufficient, of course, for a party to assert great public importance where the district court itself has not done so.⁵⁶³ Jurisdiction over cases in this subcategory is absolutely dependent on the act of certification by a district court, which operates as a condition precedent.⁵⁶⁴ Once the case is certified, the condition precedent has been fully met, and no review or redetermination of the point is necessary or proper,⁵⁶⁵ other than the Court’s decision whether to exercise its discretionary jurisdiction.

As a corollary, the failure to certify a question eliminates this potential basis for the Supreme Court of Florida’s jurisdiction.⁵⁶⁶ Thus, once a district

556. This reluctance is reflected in other contemporaneous jurisdictional refinements. In *Harvard v. Singletary*, the Court announced it would cease considering routine petitions for writs if they could instead be transferred to a lower court with concurrent jurisdiction over the matter. 733 So. 2d 1020, 1023 (Fla. 1999).

557. This is not to say that the cases dismissed are not important, merely that they do not rise to the level of great public importance.

558. *E.g.*, *Murphy v. Fla. Dep’t of Transp.*, 769 So. 2d 1040 (Fla. 2000).

559. *E.g.*, *State v. Brooks*, 788 So. 2d 247 (Fla. 2001).

560. *Sowell* noted that the question “as phrased” did not meet the standard. *State v. Sowell*, 734 So. 2d 421, 422 (Fla. 1999).

561. *Duggan v. Tomlinson*, 174 So. 2d 393, 393 (Fla. 1965).

562. *Rupp v. Jackson*, 238 So. 2d 86, 89 (Fla. 1970).

563. *Allstate Ins. Co. v. Langston*, 655 So. 2d 91, 93 n.1 (Fla. 1995).

564. *Susco Car Rental Sys. v. Leonard*, 112 So. 2d 832, 834 (Fla. 1959).

565. *Id.* at 834–35.

566. FLA. CONST. art V, § 3(b)(4).

court opinion becomes final and is not subject to rehearing or to clarification, the time has passed for a question to be certified.⁵⁶⁷ However, the Court has indicated that “any interested person” can ask for a certification by the district court at any time before the opinion becomes final.⁵⁶⁸

Under the pre-1980 constitution, a common practice for many years was for the district courts simply to certify the case without actually framing a question. Later, the Supreme Court of Florida urged the district courts to explicitly state the question being posed,⁵⁶⁹ and finally, in 1995, the Court virtually required a framed question.⁵⁷⁰ As a rationale, the Court noted that the failure to frame the question makes review more difficult, though technically not extinguishing the possibility of jurisdiction.⁵⁷¹ Framing the question is important and clearly the prevailing practice.⁵⁷² Interestingly, when questions actually are framed, the Court sometimes rephrases them in a manner that it believes better suits the purposes of review.⁵⁷³ This implies no disrespect to the court below, but merely reflects the Court’s belief that re-framing sometimes is necessary for a proper resolution of the case.

In the past, when the question was left unframed, the Court also sometimes proceeded to discuss the issue without actually framing it.⁵⁷⁴ At other times, the Court framed the question at the start of an opinion, though occasionally it was not entirely clear what the question was.⁵⁷⁵ One case was accepted for review even though the district court had issued its opinion as a summary PCA and then certified the “question.”⁵⁷⁶ This prompted a dissent from one Justice who argued that the Court should decline to review PCAs, even if certified, because the unstated “question” simply was not clear.⁵⁷⁷ The approach reflected in these earlier cases clearly is disfavored today.⁵⁷⁸

Sometimes a special problem arises in cases involving certified questions; the losing party fails to seek review of the Supreme Court of Florida.⁵⁷⁹ The Court has held that the party who prevailed on the issue embodied in a

567. *Whitaker v. Jacksonville Expressway Auth.*, 131 So. 2d 22, 24 (Fla. 1961).

568. *Id.*

569. *Duggan*, 174 So. 2d at 394.

570. *Finkelstein v. Dep’t of Transp.*, 656 So. 2d 921, 922 (Fla. 1995).

571. *Id.*

572. *See, e.g., Reed v. State*, 470 So. 2d 1382, 1383 (Fla. 1985) (quoting question as framed); *Holly v. Auld*, 450 So. 2d 217, 218 (Fla. 1984) (quoting question as framed).

573. *E.g., Waite v. Waite*, 618 So. 2d 1360, 1360 (Fla. 1993).

574. *See Trushin v. State*, 425 So. 2d 1126, 1129 (Fla. 1982).

575. *See, e.g., Radiation Tech., Inc. v. Ware Constr. Co.*, 445 So. 2d 329, 331 (Fla. 1983).

576. *Id.*

577. *Id.* at 332 (Alderman, C.J., dissenting).

578. *See Finkelstein*, 656 So. 2d at 922.

579. *See Taggart Corp. v. Benzing*, 434 So. 2d 964, 966 (Fla. 4th Dist. Ct. App. 1983).

certified question cannot seek review solely on that basis.⁵⁸⁰ In other words, the Court will not review the case if the losing party on the certified question does not petition for review, unless some other basis of jurisdiction exists.⁵⁸¹

When a certified question is properly brought by the parties, they sometimes ask the Supreme Court of Florida to relinquish jurisdiction to the district court for some reason.⁵⁸² In one such case, upon relinquishment, the district court granted rehearing and issued a new opinion that failed to include a certified question.⁵⁸³ The Court dismissed the case when it came back for review, apparently for want of jurisdiction.⁵⁸⁴ Similarly, the Court does not have jurisdiction if the en banc panel of the district court divided equally on the issue facing review, effectively meaning it reached no “decision” apart from certifying a question.⁵⁸⁵

F. *Certified Conflict*

Discretionary review jurisdiction also exists when the district court certifies that its decision is in direct conflict with a decision of another district court of appeal.⁵⁸⁶ This form of jurisdiction was created by the 1980 constitutional reforms and had no earlier analogue.⁵⁸⁷ Case law on certified conflict has done little to illuminate its scope, though—with some early exceptions—the district court opinions accepted in this way almost uniformly meet two requirements: they use the word “certify” or some variation of the root word “certif.-”⁵⁸⁸ in connection with the word “conflict;” and, they indicate a decision from another district court upon which the conflict is based. The Court sometimes has accepted jurisdiction even if some study of the district court opinion is needed to find the exact conflict case.⁵⁸⁹

580. *Id.*

581. *See* Petrik v. N.H. Ins. Co., 400 So. 2d 8, 9–10 (Fla. 1981); *Taggart Corp.*, 434 So. 2d at 966.

582. *See* FLA. R. APP. P. 9.110, 9.600.

583. *State v. Smulowitz*, 486 So. 2d 587, 588 (Fla. 1986).

584. *Id.*

585. *Boler v. State*, 678 So. 2d 319, 320 n.2 (Fla. 1996).

586. FLA. CONST. art. V, § 3(b)(4).

587. *See Constitutional Jurisdiction*, *supra* note 3, at 193.

588. One district court used the words “certificate of direct conflict.” *State v. Dodd*, 396 So. 2d 1205, 1208 n.7 (Fla. 3d Dist. Ct. App. 1981), *approved by* 419 So. 2d 333, 336 (Fla. 1982). In one case, the Court accepted “certified conflict” solely because a citation PCA contained a “contra” cite. *See Parker v. State*, 406 So. 2d 1089, 1090 (Fla. 1981), *rev’g* 386 So. 2d 1297, 1298 (Fla. 5th Dist. Ct. App. 1980).

589. *E.g.*, *Hannevacker v. City of Jacksonville Beach*, 402 So. 2d 1294, 1296 (Fla. 1st Dist. Ct. App. 1981), *approved as modified*, 419 So. 2d 308, 312 (Fla. 1982).

On the other hand, all of the cases—with few exceptions⁵⁹⁰—in which the district court has merely “acknowledged” conflict are treated as petitions for “express and direct” conflict, and some are accepted for review on that basis. The distinction between “acknowledged conflict” and “express and direct conflict” can have an important consequence, however, because express and direct conflict historically has been subject to more rigorous requirements. This history, however, has seen some significant changes in recent years.⁵⁹¹

Certified conflict cases differ in two important ways from the “express and direct” conflict subcategory, discussed above.⁵⁹² First, no briefing on jurisdiction is permitted.⁵⁹³ Historically the prohibition against jurisdiction briefs was based on the fact that certified conflict cases were accepted routinely. That has now changed. With no discussion, the Court in 1996 apparently dismissed its first certified conflict case on grounds that jurisdiction was granted improvidently.⁵⁹⁴ This has been followed with a handful of similar summary dismissals.⁵⁹⁵ Because this change in custom occurred simultaneously with a similar shift in the analysis of certified questions of great public importance,⁵⁹⁶ the Court may be motivated by a similar rationale. That is, it may be rejecting certified conflict cases because they involve narrow issues, unique facts, or both. However, the number of cases actually rejected in this manner appears to be small.⁵⁹⁷

Second, the Court has found discretion to hear certified conflict cases even if it ultimately finds no conflict, something that cannot be done for express and direct conflict.⁵⁹⁸ The policy for accepting such cases, of course, is that the very act of certifying conflict creates confusion or uncertainty in the law that should be resolved by the Court, a view the Court has approved.⁵⁹⁹ In one 1993 case, for example, the Court reviewed a certified conflict but then harmonized the cases.⁶⁰⁰ In sum, review may be easier to obtain for

590. Some cases may slip through the initial review process.

591. See discussion *infra* Part VI.F.

592. See discussion *infra* Part VI.D.

593. FLA. R. APP. P. 9.120(d).

594. See *Vega v. Indep. Fire Ins. Co.*, 666 So. 2d 897 (Fla. 1996).

595. *E.g.*, *Famiglietti v. State*, 838 So. 2d 528, 529 (Fla. 2003); *Blevins v. State*, 829 So. 2d 872 (Fla. 2002).

596. See discussion *supra* Part VI.E.

597. If the number grows larger, the Court may need to revisit its rule that jurisdictional briefing is not permitted in cases of certified conflict. FLA. R. APP. P. 9.120(d).

598. Actual conflict must exist in “express and direct” cases for the Court to have discretion to hear the case. See discussion *infra* Part VI.D.1.

599. *Clark v. State*, 783 So. 2d 967, 969 (Fla. 2001).

600. See *Harmon v. Williams*, 615 So. 2d 681 (Fla. 1993).

certified conflict than for “express and direct” conflict—apart from the handful of cases where the Court finds that jurisdiction was granted improvidently.

Finally, there is one important procedural fact that may deprive the Supreme Court of Florida’s jurisdiction even where conflict is properly certified. As with certified questions, the Court has held that the party who prevailed on the “certified conflict” issue cannot seek review based on this form of jurisdiction. In other words, the Court will decline to accept jurisdiction if the losing party does not petition for review, except where some independent basis for jurisdiction exists.⁶⁰¹ This situation may arise when the party who prevailed on the conflict issue disagrees with some other aspect of the district court opinion.

G. “Pass-Through” Jurisdiction

The next subcategory of discretionary review jurisdiction commonly has been called “pass-through” jurisdiction.⁶⁰² It essentially is a variation of a certified question for very important and pressing appeals.⁶⁰³ It must be stressed, however, that the matter certified by the district court must be an appeal, not some other category of case such as petitions for common law certiorari.⁶⁰⁴ Cases over which the district court has original jurisdiction thus cannot be certified.⁶⁰⁵ After certification, the principle feature is that the case “passes through” the district court without being heard and is sent directly to the Supreme Court of Florida for immediate resolution. This substantially speeds the appellate process.⁶⁰⁶ Its classic use was shown during the 2000 presidential election cases, in which district courts routinely certified the cases directly to the United States Supreme Court.⁶⁰⁷

The Supreme Court of Florida can hear such cases only if: 1) an appeal is pending in the district court brought from a trial court’s order or judgment; 2) the district court certifies that the case is “of great public importance” or may “have a great effect on the proper administration of justice throughout the state;” and 3) the district court certifies that immediate resolution by the

601. See *Davis v. Mandau*, 410 So. 2d 915, 915 (Fla. 1981).

602. For an opinion using the informal name, see *Fla. Patient’s Comp. Fund v. Rowe*, 472 So. 2d 1145, 1146 (Fla. 1985).

603. FLA. CONST. art. V, § 3(b)(5).

604. *State v. Matute-Chirinos*, 713 So. 2d 1006, 1007 (Fla. 1998).

605. FLA. CONST. art. V, § 3(b)(5).

606. For a considerable history underlying the development of this form of jurisdiction, see *Constitutional Jurisdiction*, *supra* note 3, at 193–96.

607. E.g., *Gore v. Harris*, 772 So. 2d 1243 (Fla. 2000).

Supreme Court of Florida is required.⁶⁰⁸ Certification can occur on the district court's own motion, or at the suggestion of a party if done within ten days of appealing to the district court.⁶⁰⁹ As noted above, it is crucial that the matter pending in the district court be an appeal. Under the constitutional language, there is no jurisdiction if the pending matter is something else, such as a petition for common law certiorari.⁶¹⁰

While the three elements above appear mandatory from the constitutional language, the Supreme Court of Florida has been lenient in accepting district court certifications fairly susceptible of meeting the requirements. The root word "certif.-" probably should be used by the district court, but it is doubtful that a case of obvious importance would be refused for failure to do so. The policy reasons for requiring a term of art in certified conflict cases do not exist here.⁶¹¹ Typically, the district courts scrupulously meet the certification requirement.⁶¹²

The Supreme Court of Florida's jurisdiction over pass-through cases attaches immediately on rendition⁶¹³ of the district court order certifying the case.⁶¹⁴ Thus, the district court loses jurisdiction at that point unless the Court relinquishes its jurisdiction.⁶¹⁵ In theory, a defective certification would not actually divest the district court of jurisdiction nor vest the Court with jurisdiction. For that reason, it is important that all concerned be certain that certification is done properly.

608. FLA. CONST. art. V, § 3(b)(5).

609. FLA. R. APP. P. 9.125(a), (c). The method of making and filing a "suggestion" is heavily regulated by rule. See FLA. R. APP. P. 9.125(c)-(f).

610. *Matute-Chirinos*, 713 So. 2d at 1007.

611. See discussion *supra* Part VI.F. for policy reasons which require a term of art in certified conflict cases. "Acknowledged" conflict cases can be "mopped up" by the "express and direct" category. There is no other category to "mop up" pass-through cases in which the district court failed to use the root word "certif.-"

612. *In re Pearson*, No. 92-0942 (Fla. 4th Dist. Ct. App. Mar. 30, 1992) (unpublished order). In the "Baby Theresa" case, for example, the Fourth District Court of Appeal issued the following certificate:

We hereby certify to the Florida Supreme Court that the order of the trial court of March 27, 1992 requires immediate resolution by the Supreme Court, because it rules on an issue of great public importance and because the relief sought in the trial court may be mooted by the natural death of the infant child of appellants.

Id.

613. Rendition occurs when a "signed, written order is filed with the clerk of the lower tribunal," subject to a few exceptions usually not applicable in these cases. FLA. R. APP. P. 9.020(h).

614. FLA. R. APP. P. 9.125(g).

615. See FLA. R. APP. P. 9.110, 9.600.

There is no requirement that the district court frame a question, although most district court panels do so.⁶¹⁶ Framing a question may be useful, but these cases almost always involve questions that are apparent to everyone. Where a question is framed, the Supreme Court of Florida usually quotes it.⁶¹⁷ If no question is framed, the Court sometimes states the issue to be reviewed⁶¹⁸ and sometimes does not.⁶¹⁹ In any event, the presence or absence of a framed question may make no difference in the Court's jurisdiction, but it can serve a useful purpose when the parties disagree on the exact nature of the question being decided.⁶²⁰

The jurisdictional history of pass-through cases has evolved over the years in much the same way as with certified questions of great public importance and certified conflict cases. Pass-through cases clearly fall within the Court's discretionary jurisdiction and can be refused, though the Court seldom has done so until more recently. In 1987, the Court first hinted at this by admonishing the district courts not to use pass-through jurisdiction "as a device for avoiding difficult issues by passing them through to this Court."⁶²¹ In 2002, the Court directly rejected jurisdiction of a pass-through case.⁶²² A concurring Justice suggested that the matter certified was not ripe for review because it involved an interlocutory question.⁶²³ This prompted an opinion from one district court in which it went to some pains to suggest why its certification was pressing enough, and why the facts at hand were ripe enough, to be heard.⁶²⁴

Usually, the cases certified in this manner truly have been pressing. These cases most commonly involve urgent questions of governmental au-

616. See, e.g., *Dep't of Corr. v. Fla. Nurses Ass'n*, 508 So. 2d 317 (Fla. 1987); *Div. of Pari-Mutuel Wagering v. Fla. Horse Council, Inc.*, 464 So. 2d 128, 129 (Fla. 1985).

617. See, e.g., *Fla. Nurses Ass'n*, 508 So. 2d at 317.

618. E.g., *In re T.A.C.P.*, 609 So. 2d 588, 589 (Fla. 1992).

619. E.g., *Chiles v. United Faculty of Fla.*, 615 So. 2d 671 (Fla. 1993).

620. For example, *T.A.C.P.* presented a situation in which some parties and amici curiae not only disagreed about the nature of a relevant medical syndrome (anencephaly), but also framed the issues in widely differing ways. 609 So. 2d at 589. Some saw the issue as whether organs could be "harvested" from a living child, while others saw the issue as whether there was a right of privacy in deciding what would happen to the body of a child who was, for all intents and purposes, dead. *Id.* When the court framed the issue at the start of the opinion, it signaled the true scope of what was being decided. *Id.*

621. *Carawan v. State*, 515 So. 2d 161, 162 n.1 (Fla. 1987).

622. *Fla. Dep't of Agric. & Consumer Servs. v. Haire*, 824 So. 2d 167, 167 (Fla. 2002).

623. *Id.* at 168 (Pariente, J., concurring).

624. See *Harris v. Coalition to Reduce Class Size*, 824 So. 2d 245, 248 (Fla. 1st Dist. Ct. App. 2002).

thority,⁶²⁵ constitutional rights that could be undermined if the case is not expedited,⁶²⁶ or personal liberties that could be jeopardized by a lengthy appeal.⁶²⁷ With rare exceptions,⁶²⁸ all these cases have involved a significant level of both immediacy and finality of fact finding. As a result, almost all such cases are handled on an expedited basis by the Court. Attorneys handling such cases thus must be prepared to respond immediately to the Court's orders and concerns.

H. *Questions Certified by Federal Appellate Courts*

The final subcategory of discretionary review jurisdiction concerns cases involving a question of law certified by the federal appellate courts. Jurisdiction is allowed here only if: 1) the United States Supreme Court or a federal court of appeals certifies a question; 2) the question is determinative of "the cause;" and 3) "there is no controlling precedent" of the Florida Supreme Court.⁶²⁹ By rule, the federal court is required to issue a "certificate" containing "the style of the case, a statement of the facts showing the nature of the cause and the circumstances out of which the questions of law arise, and the questions of law to be answered."⁶³⁰ The certificate must be sent to the Florida Supreme Court by the federal court clerk.⁶³¹ The jurisdiction granted here was not a part of the pre-1980 constitution. However, much of the same process had arisen earlier by court rule and from decisional law.⁶³² Thus, the 1980 reforms largely codified these procedures within the constitution.⁶³³

Perhaps the most significant requirement, other than the detailed formal certificate,⁶³⁴ is that there must be a "cause" from which the certified questions arise.⁶³⁵ This means that the Florida Supreme Court cannot accept questions in the abstract, but only if they are "determinative" of a particular

625. *E.g., Chiles*, 615 So. 2d at 672 (concerning the constitutionality of legislature abrogating state employees' collective bargaining agreement).

626. *See State v. Dodd*, 561 So. 2d 263, 263 (Fla. 1990) (concerning the constitutionality of statute restricting political contributions when election was nearing).

627. *See T.A.C.P.*, 609 So. 2d at 593 n.9 (regarding the right to donate organs of child soon to die where death would make organs unable to be donated).

628. *See, e.g., Carawan*, 515 So. 2d at 162 n.1.

629. FLA. CONST. art. V, § 3(b)(6).

630. FLA. R. APP. P. 9.150(b).

631. *Id.*

632. *E.g., Gaston v. Pittman*, 224 So. 2d 326 (Fla. 1969).

633. *See Constitutional Jurisdiction*, *supra* note 3, at 196.

634. *See Aldrich v. Aldrich*, 375 U.S. 249 (1963).

635. *Sun Ins. Office, Ltd. v. Clay*, 133 So. 2d 735, 741 (Fla. 1961).

case. In practice, this means that there must be an actual suit pending review in the federal appellate courts. Thus, certified questions do not ask the Florida Supreme Court to issue a purely advisory opinion. The federal courts are bound to honor and to apply the response given by the Florida Supreme Court to the actual controversy before them. Thus, all such cases involve an actual application of Florida law, often in cases premised on federal diversity jurisdiction.⁶³⁶

Certified questions accepted from federal courts are answered by way of a formal opinion, a requirement that stems in part from state statute.⁶³⁷ The holdings of that opinion can become precedent for future cases, on the theory that the Florida Supreme Court's opinion actually resolves controlling legal questions. In answering the questions, however, the Court does not "re-mand"⁶³⁸ the cause to a federal court as it would to an inferior court. Some Florida Supreme Court opinions misuse the word "remand" in this way, but the better practice is for the Court to "transmit" or "return" the cause to the federal court for further proceedings.⁶³⁹

The Court has obvious discretion to decline to answer a federal certified question. However, in practice, the federal appellate courts have been conscientious in confining certification to cases that genuinely meet the rather strict constitutional requirements. Review might be declined, for example, where a federal appellate court overlooked controlling precedent previously issued by the Florida Supreme Court.⁶⁴⁰ In that situation, the most constructive response would be for the Court to cite the controlling precedent in the order declining review.⁶⁴¹

636. See, e.g., *Allen v. Estate of Carman*, 486 F.2d 490, 492 (5th Cir. 1973).

637. FLA. STAT. § 25.031 (2004). There is no requirement to accept the case, only to issue an opinion once the case is accepted. *Id.*

638. The term "remand" implies mandate and therefore suggests a direction to an inferior court. See BLACK'S LAW DICTIONARY 1293 (8th ed. 1990). The federal appellate courts are not inferior to the Supreme Court of Florida.

639. E.g., *Dorse v. Armstrong World Indus., Inc.*, 513 So. 2d 1265, 1270 (Fla. 1987); *Bates v. Cook, Inc.*, 509 So. 2d 1112, 1115 (Fla. 1987).

640. See FLA. CONST. art. V, § 3(b)(6).

641. See *id.* The Court probably would lack jurisdiction, not merely discretion, in this situation. The constitution's strict language suggests that it is not enough for the federal appellate court to certify the case; there also must be an actual lack of controlling precedent of the Florida Supreme Court. *Id.* In any event, whether the case was dismissed for lack of jurisdiction or lack of discretion would make no difference here.

VII. DISCRETIONARY ORIGINAL JURISDICTION

The Supreme Court of Florida's discretionary original jurisdiction involves a class of legal "writs" that, with some exceptions, originated centuries ago in the English common law. Most Floridians know little about these writs, with the possible exception of habeas corpus, and even some lawyers tend to lose sight of the creative ways the writs can be used. In some circumstances, one of these so-called "extraordinary writs" may provide jurisdiction when nothing else can.

Because most of the writs are of ancient origin, there is a highly detailed body of case law governing their use. The constitution itself does little more than identify the writs and assign the Court jurisdiction over them,⁶⁴² so the Court almost always gauges these cases based on long-standing judicial precedent. As a result, these cases tend to be analyzed under a kind of "common law" approach, although, strictly speaking, the jurisdiction arises from the constitution itself. There are some limitations imposed by the constitution that did not arise from the common law, but these usually involve the specific class of persons to whom a writ may be issued by the Court.⁶⁴³

Technically speaking, the Supreme Court of Florida has jurisdiction over any petition that merely requests some form of relief available under this category. The Court's discretion, however, is limited by the body of case law and common law principles defining the scope of permissible judicial action. If the Court lacks discretion to issue a writ, it cannot grant relief as surely as if it lacked jurisdiction.

Nevertheless, there are aspects of the controlling case law that can be explained only by the distinction between jurisdiction and discretion. For example, the Court's discretion to issue any of the extraordinary writs is defined by the applicable standard of review, which differs with each writ. It is common, though not precise, to use the word "jurisdiction" in its loose sense to include limitations on discretion, in which case the Court's "jurisdiction" over the extraordinary writs also would be determined by the standard of review. However, there are cases where the Court expressly accepts jurisdiction, hears the case, and issues a full opinion determining that the standard of review has not been met and a writ cannot be issued.⁶⁴⁴ If the Court deter-

642. FLA. CONST. art. V, § 3(b)(7)-(9). In most instances, however, jurisdiction is not exclusive. The lower courts would also have jurisdiction to consider issuing one of the writs, except that petitioners usually are forbidden to seek the same remedy from another court simply because they did not like the last court's decision.

643. FLA. CONST. art. V, § 3(b)(8).

644. See, e.g., *Fla. League of Cities v. Smith*, 607 So. 2d 397, 398, 400-01 (Fla. 1992).

mined that it lacked jurisdiction of such cases, then arguably it could not even hear them, much less accept jurisdiction and issue a full opinion.

There is another aspect of “discretion” that deserves some mention. The fact that the Court’s discretion to issue the writs is limited by judicially created case law leaves open the possibility of the Florida Supreme Court refining or modifying the standards of review. Such modifications are unusual, but they do happen.⁶⁴⁵ It would be hard to say in these cases that the Court somehow has modified its own “jurisdiction,” because this would imply some inherent power to depart from the constitution. These infrequent modifications made to standards of review are best understood as changes in discretion, not changes in jurisdiction.⁶⁴⁶

There have been four highly significant changes in the way the Court exercises its discretion over writs in the last decade. First, the Court in *Harvard v. Singletary*,⁶⁴⁷ announced in 1999 that it would pursue a policy of administratively transferring writs cases to lower courts with concurrent jurisdiction absent a pressing need, especially where there are facts in dispute.⁶⁴⁸ The number of such cases had increased significantly over the prior decade, straining the Court’s docket. Moreover, the Court concluded that ordinarily trial courts are in a better position to conduct fact finding in such cases, so they are the obvious bodies to resolve factual disputes raised by writs.⁶⁴⁹ To enforce the *Harvard* rule, the Court developed an informal screening system to decide which cases should be transferred. The Court in *Harvard* stressed, however, that this did not constitute a change in jurisdiction.⁶⁵⁰ Indeed, the decision is readily explained as establishing a new rule for exercising the Court’s discretion, similar to the evolutionary refinements over the Court’s discretion to review certified questions of great public importance.⁶⁵¹ The Court’s current application of *Harvard* means very few, if any, such writs are actually considered on the merits by the Court.

Second, starting in the late 1990s and continuing through the present, the Court established that the rules otherwise applicable to express and direct

645. E.g., *Jones v. State*, 591 So. 2d 911, 915 (Fla. 1991) (modifying writ of error *coram nobis*); *Richardson v. State*, 546 So. 2d 1037, 1039 (Fla. 1989) (modifying writ of error *coram nobis*).

646. In theory, modifications to “discretion” could be so drastic as to essentially constitute a change in jurisdiction. In practice, it is unlikely the Court would take any such drastic step, which probably would invite efforts to curb the Court’s actions by way of statute or constitutional amendment.

647. 733 So. 2d 1020 (Fla. 1999).

648. *Id.* at 1023.

649. *Id.* at 1024.

650. *Id.*

651. See discussion *supra* Part VI.E.

conflict cases will apply to reviews sought by extraordinary writ. That is, the Court will not exercise its writs jurisdiction to review either a PCA⁶⁵² or a PCA issued with a citation⁶⁵³ unless it meets the rule of law explained in *Florida Star v. B.J.F.*⁶⁵⁴ This was a result obviously implied by earlier case law holding that at least one of the extraordinary writs could not be used as a device for circumventing the limitations upon the Court's ability to review PCAs.⁶⁵⁵ With this determination, the Court now has established that its discretion to review PCAs and citation PCAs is very limited indeed, no matter what basis for jurisdiction is asserted.⁶⁵⁶ This is an obvious reflection of steps being taken to address an increasingly burdensome caseload that now is well documented.⁶⁵⁷

Third, the Court has determined that persons are prohibited from filing pro se petitions for extraordinary writs raising issues related to a pending case for which they already have counsel.⁶⁵⁸ The Court based this ruling on the premise that there is no constitutional right to be simultaneously represented by counsel and act pro se.⁶⁵⁹ Rather, the person who otherwise wishes to file the pro se petition must either discharge counsel and affirmatively choose self-representation or must work through counsel.⁶⁶⁰ In reaching this decision, the Court went to some lengths to stress that this rule will apply to all future cases of a similar nature unless the petitioners clearly state their desire to discharge counsel.⁶⁶¹ Otherwise the pro se petitions will be dismissed as unauthorized.⁶⁶²

Fourth, the Court has now established a bright-line rule governing all orders that dismiss extraordinary writ petitions summarily, without elaboration. This settled a troubling problem. Summary dismissals of this type could have been based on the merits of the case or could have been a simple refusal to exercise discretionary jurisdiction. If the former, then the dismissal would have been with prejudice; if the latter, then it would have been

652. *Grate v. State*, 750 So. 2d 625, 626 (Fla. 1999) (citing *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980)).

653. *Persaud v. State*, 838 So. 2d 529, 533 (Fla. 2003).

654. 530 So. 2d 286, 288 (Fla. 1988).

655. *St. Paul Title Ins. Corp. v. Davis*, 392 So. 2d 1304, 1304-05 (Fla. 1980) (seeking review under the "all writs necessary" clause of article V, section 3(b)(7) of the Florida Constitution). This rule was reiterated in *Stallworth v. Moore*, 827 So. 2d 974, 978 (Fla. 2002).

656. The possible exception remains a PCA leaving intact a lower court order striking a state statute as unconstitutional. See discussion *supra* note 477 and accompanying text.

657. See WORKLOAD, *supra* note 555, at 21-35.

658. *Logan v. State*, 846 So. 2d 472, 475-76 (Fla. 2003).

659. *Id.* at 474 (citing *State v. Tait*, 387 So. 2d 338, 339-40 (Fla. 1980)).

660. *Id.* at 474-76.

661. *Id.* at 479.

662. *Id.*

without prejudice. There was no way of knowing from the face of the order itself. To address this problem, the Court held that all unelaborated orders dismissing extraordinary writs petitions will be deemed *not* to be decisions on the merits “unless there is a citation to authority or other statement that clearly shows that the issue was considered by the court on the merits and relief was denied.”⁶⁶³

A. *Mandamus*

The first extraordinary writ is “mandamus,” which in Latin means “we command.”⁶⁶⁴ As the name suggests, mandamus is a writ of commandment, a fact underscored by its history. In ancient times, the writ issued as a command from the sovereigns of England when they sat personally as judges; but, it later came to be a prerogative of judges of the Court of King’s Bench.⁶⁶⁵ Because of the writ’s coercive nature, its use is subject to severe restrictions developed in Florida and earlier English case law. In broad terms, the Florida Supreme Court today may issue mandamus only to compel state officers and state agencies to perform a purely ministerial action where the petitioner otherwise would suffer an injury and has a clear and certain right to have the action done.

In the Florida Supreme Court, unlike other state courts, mandamus may issue only to state officers and state agencies.⁶⁶⁶ This limitation arises from the constitution itself and is the only restriction on mandamus expressly imposed there.⁶⁶⁷ The Court has never fully defined what the terms “state officers” and “state agencies” mean. The cases appear to assume that these terms include agencies and public office holders within the three branches of state government, but nothing establishes this with any finality. Arguably, state officers could include persons holding an office created by the Florida Constitution,⁶⁶⁸ but the Court has never clearly said so. Moreover, the constitution itself seems to contrast “state officers” with “constitutional officers” elsewhere, implying they are not the same thing.⁶⁶⁹ It thus is possible that the

663. *Topps v. State*, 865 So. 2d 1253, 1258 (Fla. 2004).

664. BLACK’S LAW DICTIONARY 980 (8th ed. 2004).

665. *See State ex rel. State Live Stock Sanitary Bd. v. Graddick*, 89 So. 361, 362 (Fla. 1921).

666. Thus, the Florida Supreme Court presently cannot issue a writ of mandamus to private individuals or businesses, as it sometimes could in the past. *See, e.g., State ex rel. Ranger Realty Co. v. Lummus*, 149 So. 650 (Fla. 1933).

667. FLA. CONST. art. V, § 3(b)(8).

668. Examples include sheriffs, clerks of the circuit court, and property appraisers. FLA. CONST. art. VIII, § 1(d).

669. *See* FLA. CONST. art. V, § 3(b)(3).

term “state officers” is more inclusive than the term “constitutional officers.” Thus, this question remains an open one.

Someone seeking mandamus also must establish that the action being sought is “ministerial.” “An action is ministerial only to the extent that the respondent has no discretion over the matter.”⁶⁷⁰ There are self-evident reasons for this requirement. No court can compel that lawful discretion be exercised to achieve a particular result, however fair it may seem to do so.⁶⁷¹ The existence of discretion takes an action out of the ministerial realm. Any other rule would permit judges to exercise powers not vested in them through the simple expedient of mandamus. Thus, a respondent’s lack of discretion is an absolute prerequisite to mandamus.

However, the lack of discretion can be partial because it is possible for an action to be partly ministerial and partly discretionary. This most commonly arises where the law grants discretion to take some action but specifies a particular kind of review process and factors that must be considered when and if discretion is exercised. Sometimes a respondent may depart from the required process. When so, mandamus can issue only to require the proper process, not to mandate that any particular discretionary outcome must be reached at the end of the process. However, mandamus may be used to compel official action that falls within an established legally permissible range if that official fails to act within the range and is required by the law to do so. The fact that a court may need to interpret a statute to discern the permissible range does not make the legal right any less clear.⁶⁷²

Thus, the Court has held that mandamus cannot compel the discretionary act of granting parole to an inmate; yet mandamus potentially could be used to compel the Florida Parole and Probation Commission to conform its parole review process to the clear requirements of the constitution.⁶⁷³ Likewise, mandamus cannot be used to compel the Florida Department of Corrections to perform the discretionary act of awarding “early release” credits to inmates; yet mandamus can be used to require the Department to employ a constitutionally required process in review of such cases.⁶⁷⁴

However, mandamus cannot be used to compel an act that is purely discretionary—that is, where the official has the authority either to do or not to do it. Thus, mandamus cannot be used to compel The Florida Bar to commence disciplinary proceedings against an attorney where it has found no

670. Kogan & Waters, *supra* note 1, at 1250; *see, e.g.*, Kobayashi v. Kobayashi, 777 So. 2d 951, 952 (Fla. 2000) (Shaw, J., dissenting).

671. *E.g.*, Moore v. Fla. Parole & Prob. Comm’n, 289 So. 2d 719, 720 (Fla. 1974).

672. Schmidt v. Crusoe, 878 So. 2d 361, 363 (Fla. 2003).

673. Moore, 289 So. 2d at 720.

674. Waldrup v. Dugger, 562 So. 2d 687, 693 (Fla. 1990).

reason to do so, just as it cannot be used to compel a prosecutor to commence criminal proceedings.⁶⁷⁵

The person seeking mandamus also must show the likelihood that some injury will actually occur if the writ is not issued.⁶⁷⁶ If there is no possibility of injury, then mandamus is an inappropriate remedy.⁶⁷⁷ Thus, mandamus will not be issued if doing so would constitute a useless act⁶⁷⁸ or would result in no remedial good.⁶⁷⁹ This situation might exist, for example, where the action that would be compelled already has been done.⁶⁸⁰ For example, the Court has found the writ inappropriate where a license was taken away improperly but had been obtained in the first instance through fraud or deceit.⁶⁸¹ In other words, a valid reason existed to revoke the license and it would be a useless act to issue mandamus merely because an improper reason had been given for revocation. Moreover, injury does not exist if petitioners are able to perform the ministerial acts in question for themselves.⁶⁸²

However, injury can include some generalized harm, such as a disruption of governmental functions⁶⁸³ or the holding of an illegal election.⁶⁸⁴ Mandamus in particular is the appropriate vehicle for testing the constitutionality of new statutes “where the functions of government would be adversely affected without an immediate determination.”⁶⁸⁵ This conclusion is reinforced if the statute in question implicates a matter over which the Court has exclusive appellate jurisdiction or exclusive original jurisdiction.⁶⁸⁶

Petitioners seeking mandamus also must establish that they have a “clear and certain” right imposing a corresponding duty on the respondents to take the actions sought.⁶⁸⁷ A right is clear and certain only if it is already plainly established in preexisting law or precedent.⁶⁸⁸ Thus, the opinion in which mandamus will be issued cannot be used as the vehicle for creating a

675. *Tyson v. The Fla. Bar*, 826 So. 2d 265, 267–68 (Fla. 2002) (citing *State v. Cotton*, 769 So. 2d 345, 350 (Fla. 2000)).

676. *See Fla. League of Cities v. Smith*, 607 So. 2d 397, 401 (Fla. 1992).

677. *Id.*

678. *E.g., Bishoff v. State ex rel. Tampa Waterworks Co.*, 30 So. 808, 812 (Fla. 1901).

679. *E.g., McAlpin v. State ex rel. Avriett*, 19 So. 2d 420, 421 (Fla. 1944).

680. *E.g., Fid. & Cas. Co. of N.Y. v. Magwood*, 149 So. 29, 30 (Fla. 1933).

681. *State ex rel. Bergin v. Dunne*, 71 So. 2d 746, 749 (Fla. 1954).

682. *E.g., Gallie v. Wainwright*, 362 So. 2d 936, 939 (Fla. 1978).

683. *E.g., Dickinson v. Stone*, 251 So. 2d 268, 271 (Fla. 1971).

684. *See Fla. League of Cities*, 607 So. 2d at 398.

685. *Allen v. Butterworth*, 756 So. 2d 52, 55 (Fla. 2000) (quoting *Div. of Bond Fin. v. Smathers*, 337 So. 2d 805, 807 (Fla. 1976)).

686. *See id.* at 54 (identifying exclusive appellate jurisdiction over death penalty and exclusive original jurisdiction over practice of law).

687. *State ex rel. Eichenbaum v. Cochran*, 114 So. 2d 797, 800 (Fla. 1959).

688. *See Fla. League of Cities*, 607 So. 2d at 401.

right previously uncertain or not yet extended to the situation at hand. The right already must have come into existence through some other legal authority.⁶⁸⁹

However, the fact that some judicial interpretation of existing law may be required does not make the right it establishes any less certain.⁶⁹⁰ Moreover, the right must be “complete” and unconditional at the time the petition is brought.⁶⁹¹ The existence of any unfulfilled condition precedent renders mandamus improper.⁶⁹² Likewise, mandamus cannot be used to achieve an illegal or otherwise improper purpose⁶⁹³ because there is no right to break the law or violate public policy.

Florida courts also have frequently imposed a requirement that there be no other adequate remedy.⁶⁹⁴ This requirement was imposed on the grounds that mandamus exists to correct defects in justice, not to supersede other adequate legal remedies. The extraordinary nature of the writ supports this rationale. In 1985, the Florida Supreme Court suggested that the “no adequate remedy” requirement no longer was essential, at least in cases involving “strictly legal constitutional questions.”⁶⁹⁵ The opinion appeared to have misread the precedent on which it relied⁶⁹⁶ and was largely ignored by later case law.⁶⁹⁷ The “no adequate remedy” serves a useful purpose in that it requires petitioners to exhaust other sufficient means before burdening the Court’s docket.

689. *Id.*

690. *Schmidt v. Crusoe*, 878 So. 2d 361, 363 (Fla. 2003).

691. *Bergin*, 71 So. 2d at 749.

692. *Id.*

693. *See, e.g., State ex rel. Edwards v. County Comm’rs of Sumter County*, 22 Fla. 1, 7 (1886).

694. *E.g., Shevin ex rel. State v. Pub. Serv. Comm’n*, 333 So. 2d 9, 12 (Fla. 1976); *State ex rel. Long v. Carey*, 164 So. 199, 205 (Fla. 1935).

695. *Hess v. Metro. Dade County*, 467 So. 2d 297, 298 (Fla. 1985). *Contra* *Dep’t of Health & Rehab. Servs. v. Hartsfield*, 399 So. 2d 1019, 1020 (Fla. 1st Dist. Ct. App. 1981).

696. The *Hess* court cited *Fine v. Firestone*, 448 So. 2d 984 (Fla. 1984), which involved an alleged defect in a constitutional amendment that would be put to voters. The Court in *Fine* did not mention the “no adequate remedy” requirement. *Id.* However, it was clear that no other adequate remedy existed there; the right to a fair election was at stake, and a fair election would not be possible if a defective constitutional amendment was allowed to remain on the ballot. *Id.* at 985. The Court has extended this reasoning to legislatively proposed amendments challenged before an election, though the decision finding the ballot language defective occurred after the election. *Armstrong v. Harris*, 773 So. 2d 7, 22 (Fla. 2000). Justice Harding’s concurring opinion expressly discusses the lack of an adequate remedy in that situation. *Id.* at 24 (Harding, J., concurring).

697. *E.g., Huffman v. State*, 813 So. 2d 10, 11 (Fla. 2000) (holding that no adequate remedy is a requirement of mandamus).

The terms “state officers and state agencies” as used in the constitution include judges and courts.⁶⁹⁸ In these cases, one specialized use of the writ is to require the respondent-judges to exercise jurisdiction that has been wrongly denied in the lower court. At earlier common law, this device was known as the writ of procedendo,⁶⁹⁹ though today the same concept has been subsumed under mandamus.⁷⁰⁰ However, mandamus would be inappropriate unless the law clearly required the lower court to exercise its jurisdiction and it failed to do so.⁷⁰¹

Finally, the Supreme Court of Florida has a long-standing custom—but one not uniformly followed—regarding the actual issuance of mandamus. As a matter of courtesy, the Court usually withholds issuing the writ because the Justices are confident a respondent will conform to the majority opinion.⁷⁰² In any event, if a respondent later refused to conform, the Court could still issue a previously “withheld” writ on a proper motion to enforce the Court’s earlier decision.

B. *Quo Warranto*

Another extraordinary writ is quo warranto, which means “by what authority.”⁷⁰³ As the name suggests, quo warranto is a writ of inquiry.⁷⁰⁴ Historically, the English crown developed the writ as a means of calling upon subjects to explain some alleged abuse of the power of an office, franchise, or liberty within the Crown’s purview.⁷⁰⁵ Today, quo warranto continues in Florida as the means by which an interested party can test whether any individual improperly claims or has usurped some power or right derived from the State of Florida.⁷⁰⁶

Standing to seek quo warranto has been held to be broad and inclusive. The Supreme Court of Florida has held that any citizen may bring suit for quo warranto if the case involves “enforcement of a public right.”⁷⁰⁷ In practice, quo warranto proceedings almost always involve a public right because

698. See FLA. CONST. art. V, § 3.

699. See *Linning v. Duncan*, 169 So. 2d 862, 866 (Fla. 1st Dist. Ct. App. 1964) (citing *Newport v. Culbreath*, 162 So. 340, 342 (Fla. 1935)).

700. *E.g.*, *Pino v. Dist. Court of Appeal, Third Dist.*, 604 So. 2d 1232, 1233 (Fla. 1992).

701. *Id.*

702. *E.g.*, *Caldwell v. Estate of McDowell*, 507 So. 2d 607, 608 (Fla. 1987).

703. BLACK’S LAW DICTIONARY 1256 (8th ed. 1990).

704. *Fouts v. Bolay*, 795 So. 2d 1116, 1117 (Fla. 5th Dist. Ct. App. 2001).

705. *State ex rel. Watkins v. Fernandez*, 143 So. 638, 639 (Fla. 1932).

706. *Id.* at 640; *Martinez v. Martinez*, 545 So. 2d 1338, 1339 (Fla. 1989).

707. *Martinez*, 545 So. 2d at 1339 (citing *State ex rel. Pooser v. Wester*, 170 So. 736, 737 (Fla. 1936)).

the Florida Supreme Court can issue the writ only to "state officers and state agencies,"⁷⁰⁸ a term that apparently includes legislators and certain legislative officials.⁷⁰⁹ This limitation is the only express restriction contained in the constitution, all others being derived from case law. Thus, the cases taken to the Court usually are limited to those involving some allegedly improper use of state powers or violation of rights by these officers or agencies.

One use of quo warranto is to test the outcome of a disputed election, such as where one person has claimed the powers of the elective office but another contends this was unlawful.⁷¹⁰ Actions of this variety are governed in part by the *Florida Statutes* specifying that the petition be brought by the Attorney General or, if the latter refuses, by the person claiming title to the office.⁷¹¹ If the Court grants the petition, it can issue a judgment of ouster,⁷¹² which has the effect of vesting the claimant with title to the office. However, if the Attorney General did not consent to the suit, the judgment remains subject to challenge by the state.⁷¹³

There are other uses of quo warranto. For example, quo warranto has been used by a legislator who argued that the Governor exceeded his constitutional authority in calling a special session of the legislature.⁷¹⁴ In that instance, the petition for quo warranto was filed by the legislator as an original proceeding in the Court.⁷¹⁵ The writ has also been used to decide whether a state public defender's office exceeded its statutory authority by representing indigent clients in federal court proceedings⁷¹⁶ and, similarly, whether the Office of the Capital Collateral Regional Counsel exceeded its authority by filing claims in federal court.⁷¹⁷ It has been used to test the validity of the legislative override of gubernatorial vetoes⁷¹⁸ and the authority of the Gover-

708. FLA. CONST. art. V, § 3(b)(8). For a discussion of this limitation and its likely meaning, see discussion *supra* Part VII.A. Under earlier law, quo warranto sometimes could be used to test the validity of actions done pursuant to a franchise granted by the state, including the right to incorporate. Thus, the writ sometimes could issue against a private concern. *E.g.*, *Davidson v. State ex rel. Banks*, 20 Fla. 784, 790 (1884). The Florida Supreme Court no longer has such authority. See FLA. CONST. art. V, § 3(b)(8).

709. *Chiles v. Phelps*, 714 So. 2d 453, 456–57 (Fla. 1998).

710. *State ex rel. Gibbs v. Bloodworth*, 184 So. 1, 2 (Fla. 1938).

711. FLA. STAT. § 80.01 (2004).

712. § 80.032.

713. § 80.04.

714. *Martinez*, 545 So. 2d at 1338.

715. *Id.*

716. *State ex rel. Smith v. Jorandby*, 498 So. 2d 948, 949 (Fla. 1986).

717. *State ex rel. Butterworth v. Kenny*, 714 So. 2d 404, 406 (Fla. 1998).

718. *Phelps*, 714 So. 2d at 455.

nor to name certain persons to the Public Service Commission Nominating Council.⁷¹⁹

As in mandamus, the Supreme Court of Florida usually withholds issuance of a writ of quo warranto as a matter of courtesy where it appears the Court's decision will be honored.⁷²⁰ This custom has not been followed uniformly, however, and the failure to withhold issuance has no real significance.

C. *Writs of Prohibition*

The third extraordinary writ is that of prohibition. Like the two writs discussed above, the writ of prohibition has an ancient origin in English law.⁷²¹ It arose out of the early struggle between the royal courts controlled by the crown and the ecclesiastical courts controlled by the church.⁷²² Its primary purpose was to prevent an ecclesiastical court from encroaching upon the prerogatives of the sovereign. Thus, the writ of prohibition came into being as a preventive writ and retains that quality to this day.

In Florida, prohibition is now the process by which a higher court prevents an inferior tribunal from exceeding its jurisdiction.⁷²³ The writ may be obtained only by a petitioner who can demonstrate that a lower court is without jurisdiction or is attempting to act in excess of jurisdiction regarding a future matter, and the petitioner has no other adequate legal remedy to prevent an injury that is likely to result.⁷²⁴

The writ may only be directed by the Florida Supreme Court to a lower court and not to state agencies, state officers, or state commissions.⁷²⁵ This restriction is imposed by the constitution as a result of the 1980 jurisdictional reforms that omitted the Florida Supreme Court's specific grant of authority to issue writs of prohibition to some quasi-judicial commissions.⁷²⁶ In effect, this ended the Court's earlier practice of exercising jurisdiction over state administrative agencies when they acted in their quasi-judicial capacities.⁷²⁷

719. *State ex rel. Bruce v. Kiesling*, 632 So. 2d 601, 602 (Fla. 1994).

720. *Greenbaum v. Firestone*, 455 So. 2d 368, 370 (Fla. 1984).

721. *English v. McCary*, 348 So. 2d 293, 296 (Fla. 1977).

722. *Id.*

723. *Id.*

724. *Id.* at 296-97; *accord Sparkman v. McClure*, 498 So. 2d 892, 895 (Fla. 1986).

725. FLA. CONST. art. V, § 3(b)(7).

726. *Moffitt v. Willis*, 459 So. 2d 1018, 1020 (Fla. 1984).

727. For an example of this superseded form of jurisdiction, see *State ex rel. Vining v. Fla. Real Estate Comm'n*, 281 So. 2d 487 (Fla. 1973), where the Court issued a writ against quasi-judicial proceedings of the Florida Real Estate Commission. *Id.* at 492.

Of course, under long-standing precedent, writs of prohibition clearly cannot reach an action that is purely legislative or executive in nature.⁷²⁸

Due to the 1980 amendments, the Florida Supreme Court's power to issue writs of prohibition to courts is now the same for both the district courts⁷²⁹ and the circuit courts.⁷³⁰ Prior to the 1980 reforms, the authority over trial courts had been limited to "causes within the jurisdiction of the supreme court to review."⁷³¹ The restriction was deleted in 1980, effectively vesting the Supreme Court of Florida with potential prohibition jurisdiction over any cause arising in a trial court.⁷³²

Petitioners must also show that the lower court is without jurisdiction or is attempting to act in excess of jurisdiction. For example, prohibition is proper to restrain a lower court that clearly lacks jurisdiction over the subject matter.⁷³³ The Court often has contrasted "lack of jurisdiction" with those situations in which a court merely exercises jurisdiction erroneously. In theory, perhaps a writ of prohibition is not proper for the latter.⁷³⁴ In practice, however, there is no realistic way to draw a clear distinction between the lack of jurisdiction and the erroneous exercise of jurisdiction as the two often blur together. The case law often reaches results that seem hard to reconcile with a strict "lack of jurisdiction" element. In several cases, for example, the Supreme Court of Florida has used prohibition to prevent a lower court from imposing restraints on a prosecutor's discretion to seek the death penalty in a criminal trial. This has occurred even though the lower court plainly had jurisdiction over the issues but had merely engaged in conduct usually characterized as a clear error.⁷³⁵

728. *State ex rel. Swearingen v. R.R. Comm'rs of Fla.*, 84 So. 444, 445 (1920).

729. *See, e.g., Peltz v. District Court of Appeal, Third District*, 605 So. 2d 865 (Fla. 1992).

730. *See, e.g., Dep't of Agric. & Consumer Servs. v. Bonanno*, 568 So. 2d 24 (Fla. 1990).

731. ARTHUR J. ENGLAND, JR. & TOBIAS SIMON, *FLORIDA APPELLATE PRACTICE MANUAL* § 2.23(a) (1997).

732. *Id.*

733. *Crill v. State Rd. Dep't*, 117 So. 795, 797 (Fla. 1928).

734. *English*, 348 So. 2d at 297.

735. *E.g., State v. Donner*, 500 So. 2d 532 (Fla. 1987); *State v. Bloom*, 497 So. 2d 2 (Fla. 1986). *But see Peacock v. Miller*, 166 So. 212 (Fla. 1936) (holding prohibition not proper where inferior court has jurisdiction but commits error). The use of prohibition in the prosecutorial discretion cases following the 1980 jurisdiction reforms apparently began with *Bloom*, which cited as authority *Cleveland v. State*, 417 So. 2d 653, 653-54 (Fla. 1982). However, this is an obvious overextension of *Cleveland*, which was a case that "expressly and directly conflicts" and the Court held only that a court could not interfere with a prosecutor's discretion to refuse to allow a defendant to be placed in a pretrial intervention program. *Id.* *Cleveland* had nothing to do with prohibition. Nevertheless, the "abuse of discretion" cases do gain some support by analogy to the well established precedent that prohibition sometimes may be used as a means of disqualifying biased judges even though they clearly have jurisdiction.

On policy grounds, such a use of prohibition may be justified because it could promote judicial economy by allowing the Florida Supreme Court to prevent a clear error from infecting the entire proceeding. This would forestall the likelihood of a useless trial that must inevitably be reversed on appeal. Nevertheless, such a rule comes close to vesting the Court with a kind of interlocutory appellate jurisdiction, which could become onerous if not used with restraint. As a practical matter, however, it seems unlikely the Court will extend this use of prohibition beyond the unusual factual patterns presented in such cases.

The next element a petitioner must show in order to obtain a prohibition writ is that the alleged improper actions of the lower court will occur in the future.⁷³⁶ The Florida Supreme Court often has noted that prohibition is a preventive writ, not a "corrective" one.⁷³⁷ Thus, prohibition can be directed only to future acts, not past ones. The cases suggest that the future act must to some degree be "impending."⁷³⁸ "Past acts" can include an order already entered or proceedings already completed.⁷³⁹ Additionally, prohibition has been allowed for orders previously entered if the primary effect is on a proceeding that has not yet occurred.⁷⁴⁰ This use is justifiable in that such orders are directed to the future, but the result is a blurring of the distinction. The best interpretation probably is that a "past act" is one involving a significant degree of finality, whereas a "future act" does not.

To obtain prohibition, a petitioner must also show that no other adequate remedy exists.⁷⁴¹ The key word is "adequate."⁷⁴² Other remedies may exist that are inadequate, incomplete, or unavailable to the petitioner; if so, then prohibition is not foreclosed.⁷⁴³ As a general rule, the fact that an appeal will give the petitioner an adequate and complete remedy renders the extraordinary writ of prohibition unavailable.⁷⁴⁴ If another extraordinary writ provides an adequate and complete remedy, then prohibition also should be

E.g., *Bundy v. Rudd*, 366 So. 2d 440, 442 (Fla. 1978); *State ex rel. Bank of Am. v. Rowe*, 118 So. 5 (Fla. 1928). Judicial disqualification comes much closer to being a question of abuse of discretion than abuse of jurisdiction.

736. *English*, 348 So. 2d at 296-97.

737. *E.g.*, *Sparkman v. McClure*, 498 So. 2d 892, 895 (Fla. 1986).

738. *E.g.*, *Joughin v. Parks*, 143 So. 145, 145 (Fla. 1932).

739. *English*, 348 So. 2d at 297.

740. *E.g.*, *Donner*, 500 So. 2d at 532-33; *Bloom*, 497 So. 2d at 2-3.

741. *English*, 348 So. 2d at 297.

742. *Id.*

743. *See, e.g.*, *Sparkman*, 498 So. 2d at 895; *Curtis v. Albritton*, 132 So. 677, 680 (Fla. 1931).

744. *Sparkman*, 498 So. 2d at 895.

denied.⁷⁴⁵ However, the Court still might review the case by treating the petition as though it had requested the proper alternative remedy.⁷⁴⁶

The final requirement is that prohibition can be issued only to prevent some likely and impending injury.⁷⁴⁷ Prohibition is not available if the issues have become moot by the passage of time,⁷⁴⁸ nor can it be used to issue a purely advisory opinion establishing principles for future cases.⁷⁴⁹ Opinions discussing the writ also often describe it as being appropriate only in “emergencies,”⁷⁵⁰ implying that the likelihood of some injury must be real and immediate. As with many of the other extraordinary writs, the Court often withholds formal issuance even when prohibition is granted.⁷⁵¹

D. *Habeas Corpus*

Probably the best known of the extraordinary writs is habeas corpus, whose name in Latin means “that you have the body.”⁷⁵² The name arises from the fact that the writ always began with these words, which were directed to someone who was detaining another person. The writ typically required the respondent to bring the body of the detained person into court so that the legal validity of the detention might be examined.⁷⁵³ Habeas corpus thus arose as a writ of inquiry used to determine whether the detention is proper⁷⁵⁴ or, put more accurately, whether the restraint on liberty is lawful.⁷⁵⁵ Potentially, any deprivation of personal liberty can be tested by habeas corpus, and for that reason it is often called the “great writ.”⁷⁵⁶

745. *E.g.*, *State ex rel. Placeres v. Parks*, 163 So. 89, 91 (Fla. 1935) (holding that if mandamus is available, prohibition should be denied); *State ex rel. Booth v. Byington*, 168 So. 2d 164, 175 (Fla. 1st Dist. Ct. App. 1964) (holding that if quo warranto is available, prohibition should be denied).

746. *Cf.*, *Waldrup v. Dugger*, 562 So. 2d 687, 693 (Fla. 1990) (treating petition writ of habeas corpus as petition for writ of mandamus).

747. *English*, 348 So. 2d at 297.

748. *Wetherell v. Thursby*, 129 So. 345, 345–46 (Fla. 1930).

749. *English*, 348 So. 2d at 297.

750. *Id.* at 296.

751. *E.g.*, *State v. Bloom*, 497 So. 2d 2, 3 (Fla. 1986).

752. BLACK’S LAW DICTIONARY 728 (8th ed. 2004).

753. There no longer is any absolute requirement that the detained person be brought to court, and this earlier practice rarely occurs in the Supreme Court of Florida today.

754. *Allison v. Baker*, 11 So. 2d 578, 579 (Fla. 1943).

755. *Sylvester v. Tindall*, 18 So. 2d 892, 894 (Fla. 1944).

756. *See State ex rel. Deeb v. Fabisinski*, 152 So. 207, 209 (Fla. 1933). In ancient times, the writ of habeas corpus was divided into many subcategories, most of which now are irrelevant or have been superseded by other devices such as the *capias* or bench warrant. *Id.* at 210.

The obvious relationship to the fundamental constitutional right of liberty⁷⁵⁷ explains why habeas corpus is the only writ specifically guaranteed by the Florida Constitution's Declaration of Rights, which forbids suspension of habeas corpus except in cases of rebellion or invasion.⁷⁵⁸ Habeas corpus is also the most frequently used and most generously available of the extraordinary writs. For that reason, the case law is exceedingly large and complex. Entire treatises have been written addressing the writ's many nuances. A full discussion of habeas corpus thus is not possible within the limited space of this article. Moreover, in the last decade significant changes have been made to the *Florida Rules of Criminal Procedure* associated with habeas corpus,⁷⁵⁹ discussed briefly below.

The standard used in considering habeas corpus claims can also be complex. In very broad and general terms, the Court has said that habeas cannot be issued except where the petitioner shows reasonable grounds to believe that a present, actual, and involuntary restraint on liberty is being imposed without authority of law and that no other remedy exists. Habeas is not appropriate if the restraint has ended,⁷⁶⁰ if there is no actual restriction on liberty,⁷⁶¹ or if restrictions on liberty are mere future possibilities,⁷⁶² or have not been coercively imposed.⁷⁶³ However, even limited restraints on liberty can be sufficiently coercive to justify habeas relief, including an unlawfully imposed parole.⁷⁶⁴

Habeas is proper only if the restraint is without legal justification⁷⁶⁵ and no other remedy exists to correct the problem.⁷⁶⁶ It is often said that habeas cannot substitute for remedies available by appeal, by motion to dismiss, or by proper use of procedural devices that were available prior to the time the restraints on liberty were imposed.⁷⁶⁷ Likewise, habeas is not appropriate to the extent that the restraint on liberty itself is not the true issue. This often

757. FLA. CONST. art. I, § 9.

758. FLA. CONST. art. I, § 13. However, habeas corpus to some extent is regulated by statute. See FLA. STAT. §§ 79.01-79.12 (2004).

759. FLA. R. CRIM. P. 3.850, 3.851, 3.852, 3.853. The latter two were not adopted until after the previous version of this article was written, and the former two have been the subject of repeated amendments, litigation, and legislative action.

760. See *Rice v. Wainwright*, 154 So. 2d 693, 694 (Fla. 1963).

761. See *Moon v. Smith*, 189 So. 835, 837-38 (Fla. 1939); but see *Sellers v. Bridges*, 15 So. 2d 293, 294 (Fla. 1943).

762. *Thompson v. Wainwright*, 328 So. 2d 487, 488 (Fla. 1st Dist. Ct. App. 1976).

763. See *Sullivan v. State*, 49 So. 2d 794, 796 (Fla. 1951).

764. *Camley v. Cochran*, 123 So. 2d 249, 250-51 (Fla. 1960), *rev'd on other grounds*, 369 U.S. 506 (1962); *Sellers*, 15 So. 2d at 295.

765. See *State ex rel. Davis v. Hardie*, 146 So. 97, 97 (Fla. 1933).

766. See *Brown v. Watson*, 156 So. 327, 331 (Fla. 1934).

767. See *Adams v. Culver*, 111 So. 2d 665, 668 (Fla. 1959).

hinges on fine distinctions. For example, inmates alleging that “early release” credits were computed in an unconstitutional manner would not be entitled to habeas. In that instance, the Court determined that the real issue was not the self-evident restraint on liberty, but the improper performance of a ministerial act—computing “early release” credits—that may or may not reflect on the lawfulness of the detention, meaning that habeas was not the proper remedy.⁷⁶⁸

Under this analysis, habeas is not a proper remedy if some unfulfilled condition precedent still must occur to render any further restraint on liberty unlawful even if the writ were issued. But habeas would be one possible remedy at a later date if “early release” credits were properly computed, the inmate clearly was entitled to release, and prison officials failed to honor the law. It is worth noting, however, that an allegedly invalid death penalty itself constitutes a restraint on liberty even where there is no question that the defendant will remain in prison even if the penalty is vacated.⁷⁶⁹ But the habeas petitioner’s claim must genuinely be directed at the validity of the penalty itself, not at some other matter.⁷⁷⁰

There are three additional aspects of habeas corpus that deserve further mention. The most common and obvious use of habeas corpus is by inmates who wish to challenge the lawfulness of their present imprisonment. Dozens of petitions to this effect come to the Court every week,⁷⁷¹ almost all of which now are subject to the administrative transfer rule of *Harvard*.⁷⁷² However, habeas corpus is not strictly confined to a penal or even a criminal-law setting. “Civil detention” of a person can potentially be tested by the writ of habeas corpus, including matters beyond the obvious example of involuntary commitments for psychiatric treatment.⁷⁷³ Even detention imposed on someone by a private individual potentially can be tested by habeas cor-

768. *Waldrup v. Dugger*, 562 So. 2d 687, 693 (Fla. 1990).

769. *Compare Fitzpatrick v. Wainwright*, 490 So. 2d 938, 940 (Fla. 1986) (holding the death penalty vacated on habeas petition, and case remanded for new proceedings), *with Fitzpatrick v. State*, 527 So. 2d 809, 812 (Fla. 1988) (reducing death penalty ultimately to life imprisonment for same defendant).

770. The Court itself sometimes overlooks the fine distinctions that can be involved in determining whether a petition genuinely is challenging a restraint on liberty, not some other matter.

771. These petitions often are in the form of handwritten notes that do not meet the Court’s usual filing requirements. However, the court accepts such “pro se” petitions if they fairly appear to be seeking some form of relief, sometimes even assigning volunteer counsel to assist in exceptional cases. The Court has held that even informal communications can be sufficient to petition for habeas corpus. *Crane v. Hayes*, 253 So. 2d 435, 442 (Fla. 1971).

772. *See Harvard v. Singletary*, 733 So. 2d 1020, 1024 (Fla. 1999).

773. *E.g., Ex parte Hansen*, 162 So. 715, 717 (Fla. 1935).

pus. For example, the writ has been used where one parent alleges that the other parent has wrongfully taken custody of a child.⁷⁷⁴

The second point deserving mention is that the remedy available by habeas corpus has been supplemented and modified since the 1960s by innovations in the *Florida Rules of Court*. Most post-conviction claims previously raised by inmates through habeas now must be brought under rule 3.850 of the *Florida Rules of Criminal Procedure*⁷⁷⁵ and other associated rules⁷⁷⁶ in the trial court where the matter in question originated. Rule 3.850 was originally created by the Florida Supreme Court as an emergency means of dealing with the turmoil created by the decision of the United States Supreme Court in *Gideon v. Wainwright*.⁷⁷⁷ At the time, the rule's immediate purpose was to prevent the Florida Supreme Court and courts where state prisons were concentrated from being overwhelmed by habeas petitions prompted by *Gideon*'s holding that Florida had violated the rights of hundreds of indigent felony offenders convicted without benefit of counsel.⁷⁷⁸ Rule 3.850 redirected these claims to the trial courts from which the cases originated.

Over the years, rule 3.850 and its associated rules have retained the original purpose of creating a procedural "channel" through which a large class of habeas claims must flow. Of major importance, this includes deadlines for filing certain types of claims. In 2004, the Court emphasized the important purpose of these deadlines and made explicit what had been implicit in its rulings since the aftermath of *Gideon*—that in non-capital cases,⁷⁷⁹ petitioners cannot expand the time limitations imposed by rule 3.850 nor resurrect any other claim procedurally barred by the rule merely by characterizing their claims as habeas corpus. Habeas petitions of this type are not merely denied by the Court; they now are dismissed as unauthorized.⁷⁸⁰

Beyond this, there is already a detailed body of case law interpreting these rules, so large that an adequate outline cannot be given in an article of

774. *E.g.*, *Crane*, 253 So. 2d at 440; *Porter v. Porter*, 53 So. 546, 547 (Fla. 1910).

775. FLA. R. CRIM. P. 3.850.

776. FLA. R. CRIM. P. 3.800, 3.851, 3.852, 3.853. *See also* FLA. R. APP. P. 9.141(c), which is now the procedural substitute to raise claims for ineffective assistance of appellate counsel, which were previously raised via a habeas petition. Rule 9.141 does not apply to death penalty cases. FLA. R. APP. P. 9.141(a).

777. 372 U.S. 335 (1962). The problems *Gideon* caused, as well as the Florida Supreme Court's response, are recounted in *Roy v. Wainwright*, 151 So. 2d 825 (Fla. 1963).

778. *Roy*, 151 So. 2d at 827.

779. Starting in 2001, post-conviction cases in capital claims have been governed exclusively by rule 3.851, which includes its own time limitations. *See* FLA. R. CRIM. P. 3.851. Public records claims made by inmates under a death sentence are governed by rule 3.852. *See* FLA. R. CRIM. P. 3.852.

780. *Baker v. State*, 878 So. 2d 1236, 1245–46 (Fla. 2004).

this kind. However, the Court has not lost sight of the origin of the rules as a refinement of habeas corpus⁷⁸¹ and has expressly noted that it “will continue to be vigilant to ensure that no fundamental injustices occur.”⁷⁸² These refinements show how even the use of extraordinary writs can evolve over time. Obviously, further evolution will occur in years ahead as new problems arise that are unanticipated in the thousand years of Anglo-American precedent upon which Florida’s legal system draws. The upheaval caused by *Gideon*, for example, was met and overcome through the Court’s rule-making powers, described more fully below.⁷⁸³ The Court “channelized” habeas corpus into an orderly procedural process that not only was consistent with the constitution but helped ensure that fundamental rights would be honored without delay.

E. “All Writs”

The state constitution grants the Supreme Court of Florida authority to issue “all writs necessary to the complete exercise of its jurisdiction.”⁷⁸⁴ The operative constitutional language has remained essentially unchanged for many decades now,⁷⁸⁵ although the construction placed on that language has fluctuated at times. As a result, the Court’s “all writs” authority remains one of the most unsettled areas of jurisdiction, a problem worsened by the infrequency of all writs filings. The all writs clause cannot be understood apart from its history.

Prior to 1968, the cases dealing with the all writs clause plainly stood for two things. First, the all writs power could not be invoked unless a cause was already pending before the Court on some separate and independent basis of jurisdiction. Second, the Court’s authority in this regard could only

781. In a 1988 case, for example, the Court described rule 3.850 as “a procedural vehicle for the collateral remedy otherwise available by writ of habeas corpus,” one that creates a fact-finding function in the trial courts and a uniform method of appellate review. *State v. Bolyea*, 520 So. 2d 562, 563 (Fla. 1988) (citing *State v. Wooden*, 246 So. 2d 755, 756 (Fla. 1971)). In 1992, the Court further suggested that rule 3.850 must be construed in a manner consistent with the Florida Constitution’s stricture that habeas corpus shall be “grantable of right, freely and without cost.” *Haag v. State*, 591 So. 2d 614, 616 (Fla. 1992) (quoting FLA. CONST. art. I, § 13).

782. *Harvard v. Singletary*, 733 So. 2d 1020, 1024 (Fla. 1999).

783. See discussion *infra* Part VIII.C.

784. FLA. CONST. art. V, § 3(b)(7). For a discussion of the history underlying this provision and the case law, see Robert T. Mann, *The Scope of the All Writs Power*, 10 FLA. ST. U. L. REV. 197 (1982).

785. Compare FLA. CONST. art. V, § 3(b)(7) with *Couse v. Canal Auth.*, 209 So. 2d 865, 867 (Fla. 1968) (quoting FLA. CONST. of 1885, art. V (1957)).

be directed at purely ancillary matters. In sum, “all writs” meant ancillary writs in pending proceedings.⁷⁸⁶

Then, in the 1968 case of *Couse v. Canal Authority*,⁷⁸⁷ the Court overruled its earlier standard of review.⁷⁸⁸ Under *Couse*, the “all writs” authority would now exist over any matter falling within the Court’s “ultimate power of review” even if no case on the matter was pending in the Florida Supreme Court at the time.⁷⁸⁹ The Court sua sponte amended the *Florida Rules of Appellate Procedure* to set forth its new standard: all writs jurisdiction exists “only when it is made clearly to appear that the writ is in fact necessary in aid of an ultimate power of review.”⁷⁹⁰ In sum, the standard of review was broadened from “ancillary writs” to “aiding ultimate jurisdiction,”⁷⁹¹ though it was not altogether clear in *Couse* what this change would mean.

Two years later, the Court mentioned its all writs powers in a way that apparently expanded them even further. In a case involving a dispute between the Governor and the Legislature, the Court seemed to suggest that it was exercising some form of original all writs jurisdiction because the case “vitally affect[ed] the public interest of the State.”⁷⁹² However, the reasoning of the case is not entirely clear and actually may have focused on the use of a writ of prohibition, with the Court imprecisely referring to “the all writ section” as the basis for jurisdiction,⁷⁹³ a questionable reference that has happened before.⁷⁹⁴

Later cases have read this same language expansively. In 1974, the Court confronted a case involving the all writs authority of the district courts of appeal. In deciding the case, the Court reiterated the 1968 standard of review and added to it—the Florida Supreme Court’s original all writs jurisdiction now would extend to “certain cases [that] present extraordinary cir-

786. *E.g.*, *State ex rel. Watson v. Lee*, 8 So. 2d 19, 21 (Fla. 1942).

787. 209 So. 2d 865 (Fla. 1968).

788. *Id.* at 867.

789. *Id.*

790. *Id.* (quoting FLA. R. APP. P. 4.5(g)(1) (as amended)). Apparently, the new standard merely expanded jurisdiction. The Court still continued to issue ancillary writs in pending proceedings under its all writs power. *See, e.g.*, *Booth v. Wainwright*, 300 So. 2d 257, 258 (Fla. 1974).

791. *Couse*, 209 So. 2d at 867.

792. *State ex rel. Pettigrew v. Kirk*, 243 So. 2d 147, 149 (Fla. 1970).

793. *Id.* The headnote says that prohibition was issued, though the text of the opinion is vague on this point. *Id.* at 148–49.

794. *E.g.*, *City of Tallahassee v. Mann*, 411 So. 2d 162, 163 (Fla. 1981) (citing all writs clause as basis of jurisdiction in granting prohibition). The misreference also was tempted by another fact—both prohibition and “all writs” are authorized by the same sentence in the constitution, though the two actually are distinct and subject to radically different standards of review. *See* FLA. CONST. art. V, § 3(b)(7).

cumstances involving great public interest where emergencies and seasonable considerations are involved that require expedition.”⁷⁹⁵ It was unclear whether this statement was a revision of the *Couse* standard or added an additional requirement that must be met before all writs jurisdiction could be invoked.

For the next two years, the Court did little to explain how its all writs power would operate.⁷⁹⁶ Another dramatic reversal occurred in 1976—the Court appeared to have embraced its pre-1968 standard of review.⁷⁹⁷ No explanation was given,⁷⁹⁸ and the Court did not discuss or overrule the other cases it had issued since the late 1960s. Nor did the Court note that the relevant *Rules of Appellate Procedure* still contained the language added sua sponte to enforce *Couse*.⁷⁹⁹ The Court’s decision was subsequently criticized by one commentator as being “rightly decided but wrongly explained.”⁸⁰⁰

The older ancillary writs standard does seem dated in light of modern procedural innovations. “Common-law ‘ancillary writs’ such as *audita querela* have vanished from the law, replaced by procedural rules no longer even identified by the somewhat quaint term ‘writ.’”⁸⁰¹ In the Florida Supreme Court, modern-day descendants of the old ancillary writs are sometimes still seen, such as the writ of injunction and the related concept of a judicial “stay.”⁸⁰² “However, the Court in recent years has never attempted to use the all writs clause as the basis of jurisdiction over such matters.”⁸⁰³ Rather, the Court routinely finds some other basis of jurisdiction.⁸⁰⁴ In this

795. *Monroe Educ. Ass’n v. Clerk, Dist. Ct. of App., Third Dist.*, 299 So. 2d 1, 3 (Fla. 1974).

796. *McCain v. Select Comm. on Impeachment*, 313 So. 2d 722 (Fla. 1975). The McCain case involved an effort by a sitting Justice of the Florida Supreme Court to stop impeachment proceedings against him. *See id.* When he sought relief under the all writs clause, the Court rejected it on the grounds that it failed to set forth “a claim within the jurisdiction and responsibility of the court.” *Id.* This statement, while vague, seemed much more limited than the sweeping statements the court had made only one year earlier in 1974.

797. *Shevin ex rel. State v. Pub. Serv. Comm’n*, 333 So. 2d 9, 12 (Fla. 1976).

798. *Id.* The Court cited only one case that had nothing to do with the all writs clause and a 1942 case that clearly had been overruled in 1968. *Id.* (citing *Wilson v. Sandstrom*, 317 So. 2d 732 (Fla. 1975); *State ex. rel. Watson v. Lee*, 8 So. 2d 19 (Fla. 1942)).

799. FLA. R. APP. P. 4.5(g)(1) (1962). The rule’s language was even quoted two years later in an opinion apparently applying the pre-1968 standard of review. *Besoner v. Crawford*, 357 So. 2d 414, 415 (Fla. 1978).

800. Mann, *supra* note 784, at 212.

801. Kogan & Waters, *supra* note 1, at 1264.

802. *Id.*

803. *Id.*

804. *Jones v. State*, 591 So. 2d 911, 912, 916 (Fla. 1991) (granting stay of pending execution based on Court’s jurisdiction over judgments imposing sentence of death); *The Fla. Bar v.*

light, an ancillary writs standard risks converting “all writs” into something essentially meaningless, contrary to the settled rule that all constitutional language should be construed to have an effect.⁸⁰⁵

Nevertheless, by the late 1970s, the Court seemed to be applying the restrictive ancillary writs standard, though it typically did so with a minimum of explanation.⁸⁰⁶ Then, in 1982, another dispute between the Legislature and the Governor came to the Court that was hard to pigeonhole into any particular basis of jurisdiction. To hear the case, the Court abruptly returned to the less restrictive *Couse* standard it had adopted in 1968.⁸⁰⁷ Significantly, the 1982 Court made no mention of its earlier statements suggesting that all-writs jurisdiction would exist if the case was simply important enough.⁸⁰⁸ Rather, the Court applied the earlier “aid[ing] of the ultimate jurisdiction” standard that had been developed in 1968 by *Couse*.⁸⁰⁹ The Court found that it had all writs jurisdiction in this particular case because the Governor had taken actions that might restrict the Legislature’s ability to reapportion the state’s legislative and congressional districts.⁸¹⁰ Florida’s Constitution requires the Court to review all apportionment plans for constitutionality,⁸¹¹ so the Governor’s actions could have limited the Court’s ultimate exercise of that jurisdiction.

Little has happened in recent years to illuminate the all writs power. In 1984, the Court cited the all writs clause as the basis for hearing a death-row inmate’s request for a judicial order requiring a competency hearing, though no relief was granted.⁸¹² Exercising jurisdiction in this manner appeared to be consistent with the “aiding ultimate jurisdiction” standard since the state constitution assigns the Florida Supreme Court exclusive and mandatory appellate jurisdiction over cases involving death sentences.⁸¹³ Thus, the Court has the ultimate jurisdiction to ensure that executions are conducted lawfully.⁸¹⁴ Under this theory, the all writs clause could be invoked to re-

Dobbs, 508 So. 2d 326, 327 (Fla. 1987) (granting writ of injunction against unlicensed practice of law).

805. *Burnsed v. Seaboard Coastline R.R. Co.*, 290 So. 2d 13, 16 (Fla. 1974).

806. *St. Paul Title Ins. Corp. v. Davis*, 392 So. 2d 1304, 1304–05 (Fla. 1980) (determining that all writs clause cannot confer jurisdiction over district court PCA); *see Burnsed*, 290 So. 2d at 16.

807. *Fla. Senate v. Graham*, 412 So. 2d 360, 361 (Fla. 1982).

808. *See id.*

809. *Id.*

810. *Id.*

811. FLA. CONST. art. III, § 16(c).

812. *Alvord v. State*, 459 So. 2d 316, 317–18 (Fla. 1984).

813. FLA. CONST. art. V, § 3(b)(1).

814. *See id.*

view any matter or to issue any order necessary to ensure the propriety of a death sentence.

Moreover, the Court now has established that its all writs authority cannot be used in itself to establish jurisdiction over an otherwise unreviewable district court ruling in which the entire opinion consisted of the words "PER CURIAM. Affirmed."⁸¹⁵ This holding was a strong reaffirmation of the four-corners rule discussed above.⁸¹⁶ It came after a 2002 amendment to the *Rules of Appellate Procedure*⁸¹⁷ authorized attorneys, as part of their motions for rehearing in the district courts, to request that the lower court replace its PCA opinion with one that potentially would be reviewable by the Supreme Court of Florida.⁸¹⁸ The Court held, as it has done elsewhere,⁸¹⁹ that an extraordinary writ cannot be used to circumvent other limitations placed on its jurisdiction,⁸²⁰ such as the four-corners rule.⁸²¹

The *Couse* standard is probably best seen as very limited and cases qualifying under it would be rare. The policy of "aiding ultimate jurisdiction" makes most sense when confined to a class of cases over which the Court normally would have some form of original or appellate jurisdiction, but where the full and complete exercise of that jurisdiction seems likely to be curtailed or defeated before the Court could otherwise hear the case. That would mean there are two elements: the existence of "ultimate jurisdiction" found in the text of the constitution, and some unusual and impending factor likely to limit or frustrate the complete exercise of that jurisdiction.⁸²² This is consistent with the constitution, which itself says that the purpose of "all writs" is to allow a "complete exercise" of jurisdiction.⁸²³

The "ultimate jurisdiction" requirement would also mean that petitions to invoke this jurisdiction should identify at least two constitutional provisions establishing jurisdiction. One would be the provision creating the ultimate basis of jurisdiction, and the other would be the all writs clause. In

815. R.J. Reynolds Tobacco Co. v. Kenyon, 882 So. 2d 986, 988 (Fla. 2004).

816. See Reaves v. State, 485 So. 2d 829 (Fla. 1986).

817. Amendments to Fla. Rules of Appellate Procedure, 827 So. 2d 888 (Fla. 2002).

818. Kenyon, 882 So. 2d at 988.

819. E.g., Persaud v. State, 838 So. 2d 529, 532–33 (Fla. 2003).

820. Persaud, 838 So. 2d at 532–33.

821. Kenyon, 882 So. 2d at 990; accord St. Paul Title Ins. Corp. v. Davis, 392 So. 2d 1304, 1304–05 (Fla. 1980).

822. Obviously, this could include such traditional ancillary concerns as issuance of a temporary injunction or the stay of lower court proceedings. See City of Tallahassee v. Mann, 411 So. 2d 162, 163–64 (Fla. 1981).

823. FLA. CONST. art. V, § 3(b)(7).

other words, “all writs” as conceived in *Couse* appears to have a “dual jurisdiction” requirement.⁸²⁴

Some cases already decided in this subcategory suggest another conclusion: the Court’s all writs power is on its firmest footing in death cases, especially those involving pending executions,⁸²⁵ and in pressing governmental crises.⁸²⁶ In that vein, it is worth noting that the case *In re Order on Prosecution of Criminal Appeals*⁸²⁷ is probably best understood as an all writs case. The case obviously involved a pressing governmental crisis, as the Court expressly noted.⁸²⁸ A strong argument existed that the county governments affected by the district court’s *sua sponte* order should have been joined as parties below under the rule of due process. Moreover, the Court had “ultimate jurisdiction” over the kind of case involved,⁸²⁹ and the district court’s failure to join the counties threatened to deprive the Florida Supreme Court of the full exercise of its ultimate jurisdiction because of a technical lack of standing. This would justify “all writs” review under the *Couse* standard.

A few other aspects of all writs jurisdiction deserve comment. As noted above, the Court occasionally has cited the all writs clause as a basis for jurisdiction over writs such as prohibition, which are actually authorized by separate clauses or provisions of the constitution.⁸³⁰ This is a practice that promotes confusion and should be avoided. The Court’s all writs authority now has evolved into a distinct concept, so it muddies the waters to use the phrase “all writs” as a generalized reference to any or all of the extraordinary writs.

In this vein, it should be noted that there is at least one extraordinary writ—the writ of error *coram nobis*—for which the Court has tended to cite the all writs clause as a basis for jurisdiction.⁸³¹ However, that is an unusual case and in any event, error *coram nobis* now has been completely subsumed

824. See *Couse v. Canal Auth.*, 209 So. 2d 865, 867 (Fla. 1968); accord *Fla. Senate v. Graham*, 412 So. 2d 360, 361 (citing both all writs clause and ultimate basis of jurisdiction).

825. E.g., *Alvord v. State*, 459 So. 2d 316 (Fla. 1984).

826. E.g., *Graham*, 412 So. 2d at 360; accord *Mize v. County of Seminole*, 229 So. 2d 841, 842 (Fla. 1969).

827. 561 So. 2d 1130 (Fla. 1990).

828. *Id.* at 1131–32.

829. “Ultimate jurisdiction” potentially existed here on a number of bases, including the Florida Supreme Court authority to review cases affecting a class of state or constitutional officers, the basis actually cited for jurisdiction in the case. *Id.* at 1132; see FLA. CONST. art. V, § 3(b)(3).

830. See discussion *supra* Part VII.E.

831. E.g., *Richardson v. State*, 546 So. 2d 1037, 1037 (Fla. 1989). *Coram nobis* is not mentioned in the state constitution’s grant of jurisdiction. See FLA. CONST. art. V, § 3(b).

under existing rules of criminal procedure. The writ of error *coram nobis*⁸³² was the previous method by which a prior conviction could be challenged on the basis of newly discovered evidence.⁸³³ In 1989, the Supreme Court of Florida essentially abolished the writ as it applied to persons still in custody,⁸³⁴ though the term “error *coram nobis*” still tended to be used to identify at least some of these cases. Challenges by such persons now must be presented to the trial court pursuant to rule 3.850 of the *Rules of Criminal Procedure*.⁸³⁵

Initially, there were doubts whether the two-year time limitation for filing a rule 3.850 case would apply to proceedings in the nature of error *coram nobis*. These were dispelled in 1999 when the Court held that the time limitation did indeed apply, but it gave all potential claimants two years from the date of this decision before actions would begin to be barred.⁸³⁶ The Court also addressed the problem caused by rule 3.850’s “in custody” requirement in the same opinion.⁸³⁷ This restriction was hard to justify, since it left open the possibility that persons already released from custody would have access to a traditional form of error *coram nobis* to correct a judgment, while those still in custody would not. To eliminate this problem, the Court in 1999 amended the rule to remove the “in custody” requirement.⁸³⁸ Error *coram nobis* cases for persons not in custody frequently arise in the context of immigration proceedings.⁸³⁹ In this specific context, the Court has held that the two-year limitation applies from the date they discover they may be deported.⁸⁴⁰

Attempts have sometimes been made to use the all writs clause as a means of resurrecting a variety of writs that existed in earlier common law.⁸⁴¹ An example is the common-law writ of certiorari. This is an extraordinary “writ of review” that should be distinguished from the separate “appellate certiorari”⁸⁴² jurisdiction previously granted to the Court by provisions of the

832. The name is a peculiar blending of English and Latin. “*Coram nobis*” means “before us.” BLACK’S LAW DICTIONARY 362 (8th ed. 2004). The writ exists to bring an error “before us” for review, i.e. before the court. *Id.*

833. *Richardson*, 546 So. 2d at 1037.

834. See discussion *infra* Part VII.E.

835. *Id.* For a discussion of rule 3.850, see discussion *supra* Part VI.D.

836. *Wood v. State*, 750 So. 2d 592, 595 (Fla. 1999).

837. *Id.*

838. *Id.*

839. *E.g.*, *State v. Kalici*, 767 So. 2d 451 (Fla. 2000); *Somintac v. State*, 767 So. 2d 1171 (Fla. 2000).

840. *Pearl v. State*, 756 So. 2d 42, 46 (Fla. 2000).

841. See, e.g., *Kilgore v. Bird*, 6 So. 2d 541, 544–45 (Fla. 1942).

842. *Id.* at 544.

Florida Constitution deleted in 1980. Common-law certiorari exists to review and correct actions by a lower tribunal that violates the essential requirements of the law where no other adequate remedy exists.⁸⁴³ However, it is now clear that the Florida Supreme Court cannot issue the writ or review a writ “transferred” from a lower court.⁸⁴⁴ The Court’s authority in this regard was abolished in the 1957 jurisdictional reforms that created the district courts of appeal⁸⁴⁵ and was not revived by the 1980 reforms.⁸⁴⁶

English common law at one time had developed many other legal devices labeled “writs.”⁸⁴⁷ In theory, any of these could be revived by interpreting the Florida Constitution’s all writs clause as a generalized reference. In practice, however, such a thing is unlikely. Most of the common-law writs dealt with problems fully covered by a variety of modern legal practices and procedures, most of which are no longer even considered to be “writs.”⁸⁴⁸ On the whole, it appears likely that the Florida Constitution’s reference to “all writs” should be understood as creating a single highly specialized writ available in the extraordinary circumstances contemplated by *Couse*.⁸⁴⁹

VIII. EXCLUSIVE JURISDICTION

The Florida Constitution assigns the Supreme Court of Florida exclusive original jurisdiction in six categories, most of which deal with regulation of Florida’s Bench and Bar.⁸⁵⁰ Jurisdiction is both exclusive and original because most of the topics embraced within this category involve the Court’s administrative powers over the state’s judiciary and lawyers. The two exceptions of the six are in the case of legislative apportionment and determining incapacity of the Governor, which are unique concerns.⁸⁵¹ In the case of apportionment, jurisdiction is premised on the necessity of a final and swift legal determination that Florida’s electoral districts are constitutionally valid each time they are altered. As for gubernatorial incapacity, jurisdiction im-

843. *Id.* at 541.

844. 1-888-Traffic Schls. v. Chief Circuit Judge, Fourth Judicial Circuit, 734 So. 2d 413, 417 (Fla. 1999).

845. Robinson v. State, 132 So. 2d 3, 5 (Fla. 1961).

846. See Allen v. McClamma, 500 So. 2d 146, 147 (Fla. 1987).

847. BLACK’S LAW DICTIONARY 1608 (8th ed. 1990).

848. For example, the writ of *audita querela* now has been supplanted by the motion for relief from judgment authorized in the *Rules of Civil Procedure*. See BLACK’S LAW DICTIONARY 131 (8th ed. 1990).

849. Couse v. Canal Auth., 209 So. 2d 865 (Fla. 1965).

850. See discussion *infra* Part VIII.A-F.

851. See discussion *infra* Part VIII.E.

PLICITLY rests on the very dramatic constitutional crisis that would occur if there is a dispute over a governor's ability to fulfill the duties of office.

A. *Regulation of The Florida Bar*

The state constitution assigns the Supreme Court of Florida exclusive jurisdiction over the discipline of persons admitted to practice law.⁸⁵² As a result, attorneys constitute the only profession not subject to regulation through agencies created by the legislature. They fall within the exclusive purview of the Court. Moreover, on June 7, 1949, the Florida Supreme Court "integrated" The Florida Bar,⁸⁵³ that is, it designated it as an arm of the Court for purposes of regulating the practice of law. The Florida Bar maintains that function to this day.⁸⁵⁴ Integration also means that no one can practice law in Florida without first becoming a member of The Florida Bar.⁸⁵⁵

Regulation of attorneys operates on a number of levels. For one thing, the Court controls admissions to the Bar and promulgates rules that regulate the profession's governance and the procedures used in court.⁸⁵⁶ The Court's most significant power is its ability to discipline lawyers for improprieties based on a detailed set of ethical rules governing attorney conduct,⁸⁵⁷ with The Florida Bar serving as primary enforcer.⁸⁵⁸ In this context, the Court has said that The Florida Bar's discretion to pursue disciplinary action against an attorney is analogous to that of a prosecutor in determining whether to bring a case.⁸⁵⁹ Specifically, the decision whether to do so cannot be compelled by mandamus.⁸⁶⁰

Allegations of unethical conduct are investigated and, if meritorious, may be reviewed by Bar counsel or Bar grievance committees.⁸⁶¹ The matter then may be examined by the Board of Governors of The Florida Bar.⁸⁶² Subject to the control of the Board of Governors, Bar counsel then may file a complaint with the Florida Supreme Court, which initiates formal charges

852. FLA. CONST. art. V, § 15.

853. *In re Fla. State Bar Ass'n*, 40 So. 2d 902, 909 (Fla. 1949).

854. RULES REGULATING FLA. BAR R. 3-3.1 (2005).

855. *See Fla. State Bar Ass'n*, 40 So. 2d at 904.

856. *See discussion infra* Part VIII.C.

857. *See generally* RULES REGULATING FLA. BAR.

858. *Id.*

859. *See Tyson v. The Fla. Bar*, 826 So. 2d 265, 267-68 (Fla. 2002) (citing *State v. Cotton*, 769 So. 2d 345 (Fla. 2000)).

860. *Id.* at 268.

861. *See* RULES REGULATING FLA. BAR R. 3-3.1 (2005).

862. *Id.*

against the lawyer in question.⁸⁶³ At this point, the Chief Justice usually directs the Chief Judge of the appropriate court to appoint a “referee” to resolve factual issues and make recommendations regarding discipline.⁸⁶⁴ Referees ordinarily are sitting county or circuit judges; however, retired judges also can be appointed.⁸⁶⁵

Procedures before the referee are highly regulated by court rules and are conducted as adversarial proceedings, like a trial.⁸⁶⁶ After hearing the evidence, the referee will issue a report setting down factual findings and recommended discipline, if any.⁸⁶⁷ The report is then forwarded to the Court.⁸⁶⁸ At this point, many attorneys decline to challenge the referee’s findings and recommendations, which the Court then summarily affirms. These are called undisputed Bar cases. If attorneys dispute the reports, their cases usually are accepted for review as a “no request” without oral argument, although in rare cases oral argument is granted. The Bar also can challenge a referee’s report.

Factual findings contained in the referee’s report are presumptively correct and are accepted as true by the Court unless such findings lack support in the evidence,⁸⁶⁹—or stated another way—unless clearly erroneous.⁸⁷⁰ Proceedings before the Supreme Court of Florida are not trials *de novo* in which all matters might be revisited.⁸⁷¹ However, the referee’s purely legal conclusions—including disciplinary recommendations—are subject to broader review,⁸⁷² though they come to the Court with a presumption of correctness.⁸⁷³ In practice, the Court will depart from recommended discipline deemed too harsh or too lenient. However, the Court almost never exceeds the discipline actually requested by Bar counsel.

Discipline can range from a reprimand to disbarment.⁸⁷⁴ Nearly all forms of discipline result in a public record of the attorney’s misconduct. Disbarred attorneys typically cannot be readmitted to practice law unless at least five years have passed and they prove they have been rehabilitated⁸⁷⁵—

863. See RULES REGULATING FLA. BAR R. 3-3.2 (2005).

864. RULES REGULATING FLA. BAR R. 3-7.6(a) (2005).

865. *Id.*

866. RULES REGULATING FLA. BAR R. 3-7.6(b) (2005).

867. RULES REGULATING FLA. BAR R. 3-7.6(m)(1)(A), (C) (2005).

868. RULES REGULATING FLA. BAR R. 3-7.6(m)(2) (2005).

869. *The Fla. Bar v. Bajoczky*, 558 So. 2d 1022, 1023 (Fla. 1990).

870. *The Fla. Bar v. McKenzie*, 442 So. 2d 934 (Fla. 1983).

871. See *The Fla. Bar v. Hooper*, 507 So. 2d 1078, 1079 (Fla. 1987).

872. See *The Fla. Bar v. Langston*, 540 So. 2d 118, 120–21 (Fla. 1989) (citing *The Fla. Bar in re Inglis*, 471 So. 2d 38, 41 (Fla. 1985)).

873. *The Fla. Bar v. Poplack*, 599 So. 2d 116, 118 (Fla. 1992) (citing *The Fla. Bar v. Lipman*, 497 So. 2d 1165, 1168 (Fla. 1986)).

874. RULES REGULATING FLA. BAR R. 3-5.1(a)-(f) (2005).

875. *The Fla. Bar re Hipsh*, 586 So. 2d 311, 313 (Fla. 1991).

a difficult thing to do in many cases. Occasionally, the Court disbars without leave to reapply, in which case readmission is possible only by petitioning the Court for permission.⁸⁷⁶

B. *Admission to The Florida Bar*

The Florida Constitution also grants the Florida Supreme Court exclusive jurisdiction over admitting persons to practice law.⁸⁷⁷ The Court has created the Florida Board of Bar Examiners to oversee Bar admissions. This agency reviews all applications for admission using detailed standards included in the *Rules of Court*.⁸⁷⁸ Every applicant to the Florida Bar must undergo a rigorous background investigation conducted by the Bar Examiners, must successfully complete a two-day examination on legal knowledge, and must pass a separate examination on legal ethics, which now can be taken while the student is still in law school.⁸⁷⁹

If the background investigation reveals anything reflecting poorly on an applicant's character or fitness, the Bar Examiners are also authorized to conduct a series of hearings to resolve the matter. Any decision coming out of this process can be taken to the Court by petition for further review. The Court can then accept, reject, or modify the recommendations of the Bar Examiners. Bar admission cases are usually confidential, though a few are occasionally made public and published in *Southern Second*, often with the applicant identified only by initials.⁸⁸⁰

C. *Rules of Court*

The development and issuance of all rules governing practice and procedure before Florida courts lies within the exclusive jurisdiction of the Florida Supreme Court.⁸⁸¹ The Court has developed a very public and thorough process for rule making. Development of rules has been delegated to various committees of The Florida Bar, except local rules, which are developed by the state's lower courts, reviewed by the Local Rules Committee, and submitted to the Supreme Court of Florida for approval.

In 1993, these committees submitted proposals for revisions every four years. This quadrennial revision process now has been replaced with a stag-

876. *Id.*

877. FLA. CONST. art. V, § 15.

878. *See* RULES REGULATING FLA. BAR R. 1-14, 1-16 (2003).

879. *Id.*

880. *E.g.*, Fla. Bd. of Bar Exam'rs, *re*: S.M.D., 619 So. 2d 297 (Fla. 1993).

881. *Haven Fed. Sav. & Loan Ass'n v. Kirian*, 579 So. 2d 730, 732 (Fla. 1991).

gered two-year cycle that started in 2002. Proposed amendments to roughly half the rules are made in every even-numbered year, with the remaining half made in every odd-numbered year.⁸⁸² The Court then accepts, rejects, or modifies the amendments. This process is sometimes supplemented with special proposals by the committees, petitions for revisions filed by Bar members, and the much rarer *sua sponte* revisions issued by the Court “if an emergency exists that does not permit reference to the appropriate committee of The Florida Bar for recommendations.”⁸⁸³ Out-of-calendar rules revisions sometimes are necessary to address changes in statutory law. Though it seldom happens, court rules can be repealed by a two-thirds vote in each house of the Legislature.⁸⁸⁴ The lower courts cannot ignore or amend controlling rules.⁸⁸⁵

The Court’s rule-making authority extends only to procedural law, not substantive law. Though the boundary separating the two is not entirely precise, the Court has said that “procedural” law deals with the “course, form, manner, means, method, mode, order, process or steps” by which substantive rights are enforced.⁸⁸⁶ “Substantive” law “creates, defines, and regulates rights.”⁸⁸⁷ In other words, “procedure” is the “machinery of the judicial process” while “substance” is the product reached.⁸⁸⁸

These distinctions are important because they separate the rule-making authority of the Court from the lawmaking authority of the Legislature. Thus, it is possible for the Legislature to enact a “procedural” statute that can be superseded by court rule⁸⁸⁹ just as it is possible for the Court to enact a rule so substantive in nature that it violates the legislature’s prerogative.⁸⁹⁰ Disagreements between the two branches of government have occurred, most noticeably in the development of the *Florida Evidence Code*.⁸⁹¹ For the most part, however, the Court has enacted rules consistent with legislative amendments to the Evidence Code, sometimes even when The Florida Bar

882. FLA. R. JUD. ADMIN. 2.130(c)(1).

883. FLA. R. JUD. ADMIN. 2.130(a).

884. FLA. CONST. art. V, § 2(a). This occurred in early 2000 during passage of a package of death-penalty statutes subsequently found unconstitutional by the Court. See *Allen v. Butterworth*, 756 So. 2d 52, 64 (Fla. 2000).

885. *State v. McCall*, 301 So. 2d 774, 775 (Fla. 1974).

886. *Kirian*, 579 So. 2d at 732 (citing *In re Fla. Rules of Criminal Procedure*, 272 So. 2d 65, 66 (Fla. 1972) (Adkins, J., concurring)).

887. *Id.* (citing *State v. Garcia*, 229 So. 2d 236 (Fla. 1969)).

888. *Id.* (citing *Fla. Rules of Criminal Procedure*, 272 So. 2d at 66 (Adkins, J. concurring)).

889. *Id.*

890. *E.g.*, *State v. Furen*, 118 So. 2d 6, 12 (Fla. 1960).

891. *E.g.*, *In re Amendments to the Fla. Evidence Code*, 782 So. 2d 339, 342 (Fla. 2000) [hereinafter *Evidence Amendments I*].

recommended against doing so.⁸⁹² On occasion, the Court has even called for a “cooperative” effort with the legislature to eliminate problems between conflicting statutes and rules⁸⁹³ and occasionally has deferred adopting a legislative change to the *Florida Evidence Code* until the legislative committee could provide additional information requested by the Justices.⁸⁹⁴ However, the Court lacks any authority to issue rules governing state administrative proceedings, which fall within the legislature’s authority.⁸⁹⁵ This includes executive branch agencies that are quasi-judicial in nature, such as the courts of compensation claims.⁸⁹⁶

It is worth noting that by promulgating a rule, the Court does not vouch for its constitutionality.⁸⁹⁷ A court rule could thus be challenged in a future proceeding on any valid constitutional ground. This is because rules are issued as an administrative function of the Court, not as an adjudicatory function. There are no parties arguing an actual dispute, the nature of which may be unforeseen at the time the rule is adopted.⁸⁹⁸ In sum, there is no case or controversy to resolve in a rule-making case.⁸⁹⁹ For much of the same reason, the act of promulgating a rule does not foreclose challenges that it contains substantive aspects that are invalid. Questions such as these can only be decided when affected parties bring an actual controversy for resolution. Thus, ruling on the constitutional aspects of a newly adopted rule risks giving an advisory opinion.⁹⁰⁰

892. *In re Amendments to the Fla. Evidence Code*, 825 So. 2d 339, 341 (Fla. 2002) [hereinafter *Evidence Amendments I*].

893. *Leapai v. Milton*, 595 So. 2d 12, 14 (Fla. 1992).

894. *Amendments to the Fla. Rules of Workers’ Comp. Procedure*, 29 Fla. L. Weekly S787 (Fla. 2004).

895. *Gator Freightways, Inc. v. Mayo*, 328 So. 2d 444, 446 (Fla. 1976); *Bluesten v. Fla. Real Estate Comm’n*, 125 So. 2d 567, 568 (Fla. 1960).

896. *Amendments to the Fla. Rules of Workers’ Comp. Procedure*, 29 Fla. L. Weekly S738, S739 (Fla. 2004).

897. *Report of the Supreme Court Workgroup on Pub. Records*, 825 So. 2d 889, 890 (Fla. 2002).

898. *See, e.g., Evidence Amendments I*, 782 So. 2d at 341. This opinion declined “to address the substantive/procedural issues until such time as the issue comes before the Court in a true ‘case or controversy.’” *Id.* It should be emphasized, however, that this comment was made in the context of refusing to adopt a purported statutory change to the hearsay rule. *Id.* at 340–41.

899. *Evidence Amendments II*, 825 So. 2d at 341.

900. *See discussion supra* Part IV for discussion of the policy against giving advisory opinions.

D. *Judicial Qualifications*

The next form of exclusive jurisdiction governs “judicial qualifications,” which exist solely for the purpose of disciplining the state’s judges and justices for ethical improprieties. It is analogous to Bar discipline, though accomplished through a different agency. Jurisdiction here rests on a constitutional provision that specifies in considerable detail how such cases are reviewed.⁹⁰¹ As noted earlier, cases of this type are commenced at the instance of the Judicial Qualifications Commission (“JQC”), which is authorized to investigate alleged impropriety by any judge or justice.⁹⁰² Upon recommendation of the JQC, the Supreme Court of Florida is then vested with jurisdiction to consider the case.

Jurisdiction here is exclusive because the discipline proposed by the JQC is considered to be only a recommendation.⁹⁰³ The JQC is a separate body with its own rule-making authority.⁹⁰⁴ The JQC’s factual findings are given a presumption of correctness on review while its recommendations are persuasive but not conclusive,⁹⁰⁵ and the Florida Supreme Court has sometimes departed from recommended discipline.⁹⁰⁶ Indeed, the Supreme Court “may accept, reject, or modify in whole or in part the findings, conclusions, and recommendations” brought before it.⁹⁰⁷ Moreover, the JQC does not constitute a “court” in itself and is not subject to the writ of prohibition.⁹⁰⁸ Discipline recommended by the JQC will be imposed only when supported by clear and convincing proof of the impropriety in question.⁹⁰⁹

The Court has held that judicial qualification proceedings are not in the nature of a criminal prosecution and are not subject to the constitutional restraints peculiar to criminal law.⁹¹⁰ The doctrines of *res judicata* and double jeopardy do not apply⁹¹¹ and the JQC can, therefore, inquire into matters previously investigated in other contexts. As noted earlier, the Florida Constitution automatically disqualifies the sitting Justices of the Florida Supreme Court to hear a proceeding brought against one of their own number. Instead, a panel of specially appointed “Associate Justices” will hear the case.

901. FLA. CONST. art. V, § 12.

902. *See supra* Part II.H.1.

903. *State ex rel. Turner v. Earle*, 295 So. 2d 609, 610–11 (Fla. 1974).

904. FLA. CONST. art. V, § 12(a)(4).

905. *Turner*, 295 So. 2d at 610–11 (Fla. 1974).

906. *In re Norris*, 581 So. 2d 578, 579–80 (Fla. 1991).

907. FLA. CONST. art V, § 12(c)(1).

908. *Turner*, 295 So. 2d at 611.

909. *In re LaMotte*, 341 So. 2d 513, 516 (Fla. 1977).

910. *In re Kelly*, 238 So. 2d 565, 569 (Fla. 1970).

911. *Id.* at 570.

E. *Review of Legislative Apportionment*

In every year ending in the numeral two, the Florida Legislature is required to reapportion the state's legislative and congressional districts to reflect the latest United States Census.⁹¹² Reapportionment must be finalized before the fall's elections that same year, which might not be possible if lawsuits on the question began in some lower court and wended through the appellate system. Accordingly, the state constitution has given the Court exclusive, original, and mandatory jurisdiction to review each decennial reapportionment plan approved by the legislature.⁹¹³

The Court's authority in this regard is extraordinary and limited.⁹¹⁴ All questions regarding validity of the reapportionment plan can be litigated to finality in a single forum, for both trial and appellate purposes.⁹¹⁵ Moreover, if the legislature is unable to reapportion within certain time constraints, the Court itself has authority to impose a reapportionment plan by order.⁹¹⁶ Judicial apportionment, for example, was necessary in 1992 with respect to some of the state's districts.⁹¹⁷ In that instance, the Court was swayed by arguments of the United States Justice Department regarding the federal Voting Rights Act.⁹¹⁸ Thus, federal issues are an important concern here. It should be noted, however, that the Supreme Court of Florida's determination of validity does not necessarily bind the federal courts or the Justice Department.⁹¹⁹

F. *Gubernatorial Incapacity*

The last form of exclusive jurisdiction vests the Florida Supreme Court with authority to decide if the governor cannot fulfill the duties of office due to incapacity. Any inquiry into this form of jurisdiction must begin with a brief explanation of laws governing succession in other contexts. It is clear, for example, that the Lieutenant Governor succeeds to the office of Governor immediately upon the occurrence of a vacancy, whether by death, by resigna-

912. FLA. CONST. art. III, § 16(a).

913. FLA. CONST. art. III, § 16(c).

914. See *In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d 819 (Fla. 2002).

915. See *id.*

916. See *id.*

917. *In re Constitutionality of Senate Joint Resolution 2G*, 601 So. 2d 543, 544 (Fla. 1992).

918. *Id.* at 544-45.

919. *Id.* at 545.

tion, or by removal following impeachment.⁹²⁰ The Lieutenant Governor likewise becomes acting Governor automatically once the Governor is impeached and until acquittal by the Senate.⁹²¹ Moreover, if the Lieutenant Governor cannot succeed to the office in any situation, the succession is established by state law.⁹²²

The constitutional language is not as clear in describing what happens if a Governor is allegedly unable to perform the duties of office due to incapacity. The relevant language states that the Lieutenant Governor will become acting Governor during the period of incapacity.⁹²³ However, the constitutional provision then falls into ambiguity by not stating exactly how incapacity will be determined. There are two separate methods of officially establishing incapacity.⁹²⁴ The first is that the Florida Supreme Court “may” determine the issue upon due notice after the filing of a written suggestion of incapacity by the full cabinet⁹²⁵—the Attorney General, the Chief Financial Officer, and the Commissioner of Agriculture.⁹²⁶ The second is that the Governor “may” establish the fact by filing a certificate of incapacity with the custodian of state records.⁹²⁷

The obvious ambiguity rests on this question: Does the word “may” in these two provisions mean that one or the other method must be used, or does it mean that neither is absolutely necessary? In other words, could the Lieutenant Governor simply assume the role of acting Governor without either of these two processes occurring? Common sense dictates that there must be some formal process for determining incapacity, if only to establish that the person acting as Governor has lawfully assumed the executive powers. If these powers were not lawfully vested, every action by the Lieutenant Governor would be subject to legal challenge. This in turn suggests that the two methods of certifying gubernatorial incapacity are alternatives, at least one of which must occur.

Moreover, this same conclusion is reinforced by the fact that a Lieutenant Governor assuming the role of acting Governor without any such certification would be subject to a petition for writ of *quo warranto*, which under

920. FLA. CONST. art. IV, § 3(a).

921. FLA. CONST. art. IV, § 3(b).

922. FLA. CONST. art. IV, § 3(a); *see also* FLA. STAT. §§ 14.055, .056 (2002).

923. FLA. CONST. art. IV, § 3(b).

924. *Id.*

925. *Id.*

926. *Compare id. with* FLA. CONST. art. IV, § 4(a).

927. FLA. CONST. art. IV, § 3(b). The Governor might file such a certificate, for example, before undergoing serious surgery. This would permit the Lieutenant Governor to serve as acting Governor until such time as the Governor files another certificate indicating that the incapacity no longer exists. *Id.*

established case law could be filed by any state citizen.⁹²⁸ By this means the issue could be brought before the Court if neither of the two requirements were met. *Quo warranto*—perhaps in connection with the Court's all-writs authority⁹²⁹—thus also would exist as a potential means of addressing the legal issues that would arise if a governor was unable to declare incapacity and one or more members of the cabinet refused to join in the suggestion of incapacity filed with the Court.⁹³⁰ All-writs jurisdiction might properly exist if the refusal of the parties in question would frustrate the Court's jurisdiction to determine incapacity of the Governor, even if the Court ultimately found the allegations unfounded.⁹³¹ This would be so because the constitutional language leaves open the possibility that a Governor could be truly incapacitated and the Lieutenant Governor could be unable to act as Governor if the cabinet was unable to agree on the issue. In that unlikely situation, the state could be left without an acting executive.

Once the suggestion is filed by the cabinet, the Court resolves the issue as both fact-finder and final adjudicator of the question. The constitution is silent as to what standard must be used, and the Court has never had an occasion to interpret this provision of the constitution since it was added in 1968. However, there is at least one actual case from another state. In 2003, the Governor of Indiana suffered a stroke that rendered him unconscious for a period of time before he died.⁹³² The analogous provision of the Indiana Constitution required that a petition be filed with the Indiana Supreme Court by the Speaker of the House and President of the Senate.⁹³³ A few days later these two officers filed their petition, but included with it a statement by the attending physician verifying the Governor's incapacity and a letter from the Governor's general counsel stating that the Governor's family approved of the transfer of power.⁹³⁴ The Indiana Supreme Court approved the request

928. *State ex rel. Watkins v. Fernandez*, 143 So. 638, 640 (Fla. 1932); *Martinez v. Martinez*, 545 So. 2d 1338, 1339 (Fla. 1989) (citing *State ex rel. Pooser v. Wester*, 170 So. 736, 737 (Fla. 1936)).

929. FLA. CONST. art. V, § 3(b)(7).

930. There is an enhanced possibility in Florida that political motivations could come into play in some future dispute over alleged incapacity because the three cabinet members are elected independently of the Governor and Lieutenant Governor. *See* FLA. CONST. art. IV, §§ 1, 4.

931. FLA. CONST. art. V, § 3(b)(7).

932. Mary Beth Schneider, *O'Bannon Dies*, INDIANAPOLIS STAR, Sept. 14, 2003, at A1 [hereinafter *O'Bannon Dies*].

933. Mary Beth Schneider et al., *Power Transferred to Kernan*, INDIANAPOLIS STAR, Sept. 11, 2003, at A1.

934. *Id.*; *O'Bannon Dies*, *supra* note 932.

and expressly ratified all actions of the acting Governor from the time the Governor became incapacitated.⁹³⁵

The Indiana example shows an obvious attempt to establish complete certainty about the Governor's condition and the transfer of authority. In its order, the Indiana court expressly found that there was "no basis for doubt or dispute" about the Governor's incapacity. The situation obviously would be different if a doubt or dispute did exist, especially if the dispute was raised by the Governor in question. While not offering much guidance on this latter hypothetical issue, the actual events in Indiana suggest a central point—a great unwillingness on the part of all concerned, including the Indiana court, to seek and certify incapacity if it was in any sense a political act. "Doubt or dispute" thus could be seen as the line dividing obvious cases of incapacity from those requiring a far more stringent standard of review.

Under Florida's constitutional scheme, a similar procedure appears to be contemplated. The Florida Constitution expressly provides for impeachment in the House followed by trial in the Senate of any Governor "for misdemeanor in office."⁹³⁶ While one case suggests that this phrase must be defined by the legislature itself,⁹³⁷ another says that the term is broader than the criminal concept of "misdemeanor" and includes any "willful malfeasance, misfeasance, or nonfeasance in office."⁹³⁸ Further, the term may not even require actual corruption or criminal intent.⁹³⁹ The very fact that this impeachment process exists—and is exclusively placed in the hands of the inherently political legislative branch of government—means it would be illogical to seek a certification of incapacity in the Supreme Court of Florida for any situation that merely involves impeachable activity.

The impeachment process likewise requires supermajorities in both houses and other extraordinary safeguards that do not exist in certifying incapacity.⁹⁴⁰ A fair conclusion, supported by the Indiana example, is that certification of incapacity exists only to address a truly catastrophic failure in the Governor's physical or mental health, whether short or long-lived. It does not exist to serve as a faster means of impeachment, nor is it a proper remedy where the motivations are political. In sum, where there is "doubt or dispute" about incapacity, the Court would show great reluctance to certify

935. *In re Temp. Inability of Governor Frank L. O'Bannon to Discharge the Duties of Office*, 798 N.E.2d 838, 838–39 (Ind. 2003).

936. FLA. CONST., art. III, § 17(a), (c).

937. *Forbes v. Earle*, 298 So. 2d 1, 5 (Fla. 1974).

938. *In re Investigation of a Cir. Judge of the Eleventh Jud. Cir. of Fla.*, 93 So. 2d 601, 605–06 (Fla. 1957).

939. *Id.* at 606.

940. FLA. CONST. art. III, § 17(a), (c).

incapacity. If the allegations fairly constitute impeachable activities, incapacity would not be warranted and the matter would be left to the legislature to resolve.

After the Florida Supreme Court certifies the incapacity of a Governor, it also has exclusive jurisdiction to determine that the incapacity no longer exists, thereby transferring the executive powers back to the Governor.⁹⁴¹ This jurisdiction is invoked in the same way described above—by the filing of a written suggestion with the Court. However, the suggestion in this instance can be filed by the unanimous cabinet, by the Governor individually, or by “the legislature.”⁹⁴² While it might be cumbersome for the legislature to convene and vote on the issue, it appears unlikely that the need would arise except in some extraordinary situation. The most likely person to file the suggestion is the Governor seeking restoration of the executive powers.

IX. CONCLUSION

The Supreme Court of Florida was created in 1845 and held its first sessions the following year. Since that time, a considerable body of custom and precedent has come into existence regarding the Court’s operation and jurisdiction. This body is not widely known outside the Court, nor has there been much previous effort to compile information about routine operations in a comprehensive collection. The present article is an effort to fill this gap, to update the previous 1993 article because of major changes that have occurred in the intervening years, and to provide information to lawyers and laypersons about their state’s highest court.

941. FLA. CONST. art. IV, § 3(b).

942. *Id.*

PRESIDENTIAL ELECTIONS—THE RIGHT TO VOTE AND ACCESS TO THE BALLOT

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* John B. Anderson, of the faculty of Nova Southeastern University's Shepard Broad Law Center, and students Jason Blank and Tom Brogan, examined the subject of ballot access for non-major party candidates in presidential elections in the wake of the recent decision of the Supreme Court of Florida in *Reform Party of Florida v. Black*.

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SECTION I: CO-AUTHORS' INTRODUCTION

The following article is a tripartite effort by Mitchell Berger and Grace E. Robson, members of the Florida Bar; John B. Anderson, a member of the Nova Southeastern University's Shepard Broad Law Center faculty; and a team of two of the students at that law school, Jason Blank and Tom Brogan, to examine the subject of ballot access for non-major party candidates in presidential elections in the wake of the recent decision of the Supreme Court of Florida in *Reform Party of Florida v. Black*.¹ Mr. Berger has furnished a critical analysis of that decision. Our team of students has catalogued the ballot access laws of the fifty states and the District of Columbia. John B. Anderson has reviewed United States Supreme Court decisions on the subject of ballot access specifically, and then also more generally on the way in which they reflect on the electoral process; a process which for a century and a half has been dominated by our two major parties. His criticism of the resulting duopoly of political power and control should be attributed to him alone and not to the other members of this collaborative effort. However, both Mr. Berger and Mr. Anderson support the idea of a constitutional amendment putting forth an affirmative right to vote as both necessary and desirable as a predicate for any effort to achieve a more uniform approach to ballot access in future presidential contests. We also join in our appreciation for the research assistance of Messrs. Blank and Brogan and their contribution to our joint effort.

1. 885 So. 2d 303 (Fla. 2004).

**SECTION II: THE SUPREME COURT DECISIONS IN
ELECTION 2000 LIVE ON: A CRITICAL ANALYSIS OF THE
SUPREME COURT OF FLORIDA CASE, *REFORM PARTY OF
FLORIDA v. BLACK***

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I. INTRODUCTION

Recent elections have raised questions and concerns regarding a person's ability to "get on the ballot." Should there be restrictions? Are the restrictions in place sufficient?

Currently, each state has laws governing the requirements for an individual to get on the general election ballot as a candidate for President of the United States.² This article critically analyzes the recent Supreme Court of Florida case pertaining to ballot access for minor party candidates, *Reform Party of Florida v. Black*.³ More specifically, this article discusses the applicable Florida law and the shortcomings of the majority's decision in interpretation thereof. In addition, this article discusses how to prevent the courts from being confronted with making decisions that fail to apply the law. This solution proposes an amendment to the United States Constitution that would mandate: any eligible registered voter in the United States and the District of Columbia would have the right to vote for an elector in his or her respective place of residence (or directly for the President if the electoral college were abolished); that equal machinery be used to count the votes; and that uniform standards be provided for ballot access with respect to candidates seeking election to the office of President of the United States.

The judiciary's role is to interpret laws.⁴ In fulfilling this task, courts routinely use canons of construction to construe statutes, whether they are state, federal, or otherwise. However, on September 17, 2004, when the Supreme Court of Florida decided the case *Reform Party of Florida*, the majority failed to apply basic rules of statutory construction and ignored uncontroverted evidence in ruling that Ralph Nader and Peter Camejo should be listed as presidential and vice-presidential candidates on Florida's general election

2. See *infra* APPENDIX.

3. See generally *Reform Party of Fla.*, 885 So. 2d at 303–21.

4. See, e.g., *United States v. Morrison*, 529 U.S. 598, 616–17 n.7 (1999).

ballot.⁵ Regardless of party affiliation, a review of this case shows that the majority failed to do its job, which in this case, was interpreting a Florida statute.⁶

A. *Florida Legislature Modified Ballot Access Law*

In 1999, the Florida Legislature uncoupled the requirement of gathering signatures and affiliating with a national party.⁷ The current form of the stat-

5. See *Reform Party of Fla.*, 885 So. 2d at 304.

6. See *id.* at 312.

7. See FLA. STAT. § 103.021(3) (2004). This section provides:

Candidates for President and Vice President with no party affiliation may have their names printed on the general election ballots if a petition is signed by 1 percent of the registered electors of this state, as shown by the compilation by the Department of State for the last preceding general election. A separate petition from each county for which signatures are solicited shall be submitted to the supervisor of elections of the respective county no later than July 15 of each presidential election year. The supervisor shall check the names and, on or before the date of the first primary, shall certify the number shown as registered electors of the county. The supervisor shall be paid by the person requesting the certification the cost of checking the petitions as prescribed in s. 99.097. The supervisor shall then forward the certificate to the Department of State which shall determine whether or not the percentage factor required in this section has been met. When the percentage factor required in this section has been met, the Department of State shall order the names of the candidates for whom the petition was circulated to be included on the ballot and shall permit the required number of persons to be certified as electors in the same manner as party candidates.

Id. See also section 103.021(4), *Florida Statutes*, which provides:

(a) A minor party that is affiliated with a national party holding a national convention to nominate candidates for President and Vice President of the United States may have the names of its candidates for President and Vice President of the United States printed on the general election ballot by filing with the Department of State a certificate naming the candidates for President and Vice President and listing the required number of persons to serve as electors. Notification to the Department of State under this subsection shall be made by September 1 of the year in which the election is held. When the Department of State has been so notified, it shall order the names of the candidates nominated by the minor party to be included on the ballot and shall permit the required number of persons to be certified as electors in the same manner as other party candidates.

(b) A minor party that is not affiliated with a national party holding a national convention to nominate candidates for President and Vice President of the United States may have the names of its candidates for President and Vice President printed on the general election ballot if a petition is signed by 1 percent of the registered electors of this state, as shown by the compilation by the Department of State for the preceding general election. A separate petition from each county for which signatures are solicited shall be submitted to the supervisors of elections of the respective county no later than July 15 of each presidential election year. The supervisor shall check the names and, on or before the date of the first primary, shall certify the number shown as registered electors of the county. The supervisor shall be paid by the person requesting the certification the cost of checking the petitions as prescribed in s. 99.097. The supervisor shall then forward the certificate to the Department of State, which shall determine whether or not the percentage factor required in this section has been met. When the percentage factor required in this section has been met, the Department of State shall order the names of the candidates for whom the petition was circulated to be included on the ballot and shall permit the required number of persons to be certified as electors in the same manner as other party candidates.

ute provides that a minor party candidate can get on the general election ballot as a presidential candidate if the candidate either obtains a petition signed by one percent of the Florida registered voters *or* if the minor party is affiliated with a national party holding a national convention to nominate candidates for President and Vice President of the United States.⁸

B. *Procedural History*

On August 31, 2004, Ralph Nader and Peter Camejo submitted papers to the Secretary of State of Florida pursuant to section 103.021(4)(a) of the *Florida Statutes* in order to be placed as Reform Party candidates for President and Vice-President on the ballot for the general election scheduled for November 2, 2004.⁹ Governor Bush certified the Reform Party slate to the Florida Secretary of State who certified “Nader and Camejo be placed on the 2004 Florida presidential ballot.”¹⁰ Complaints were filed against the Secretary of State, Nader, and Camejo alleging that Nader and Camejo were not “‘minor party’ candidates affiliated with a national party” as required by section 103.021(4)(a) of the *Florida Statutes*, but were “independent candidates who use[d] the name ‘Reform Party of Florida’ to claim affiliation with the national Reform Party where no affiliation actually exist[ed].”¹¹ The Circuit Court for the Second Judicial District, in and for Leon County, issued a preliminary injunction enjoining the Secretary of State of Florida from certifying Nader and Camejo as candidates for the Florida 2004 presidential ballot, finding that: 1) “the Reform Party USA is not a ‘national party[;]’” 2) “Nader and Camejo were not nominated in a ‘national convention’” because they “were endorsed by the party via a conference telephone call,” which “did not follow the Reform Party USA’s own definition of a ‘national convention’” and further, “an April 2002 letter from the Chairman of the Reform Party of Florida shows that the Florida sector [has] disaffiliated from the national party[;]” 3) “the Reform Party of Florida is not affiliated with the Reform Party USA[;]” and 4) “Florida has important interests in enforcing its election laws, ensuring that only qualified candidates appear on its ballot, protecting the integrity of the ballot and election process, and preventing voter confusion during the election.”¹² The preliminary injunction issued by the circuit court was appealed by Nader and Camejo to the First District

§ 103.021(4).

8. See FLA. STAT. § 103.021(3)-(4) (2004).

9. See *Reform Party of Fla.*, 885 So. 2d at 304.

10. *Id.*

11. *Id.* at 304–05.

12. *Id.* at 305–06.

Court of Appeal, and a stay of the injunction, pending review, was also sought.¹³ In addition, the Secretary of State of Florida filed a notice of appeal invoking an automatic stay of the injunction pursuant to rule 9.310(b)(2) of the *Florida Rules of Appellate Procedure* and accordingly directed the supervisors of elections to include Nader and Camejo on the ballot.¹⁴ The First District Court of Appeal certified the appeal of the order to the Supreme Court of Florida as requiring the immediate resolution pursuant to rule 9.125 of the *Florida Rules of Appellate Procedure*.¹⁵ The Supreme Court of Florida agreed to accept jurisdiction while permitting the litigation to continue in circuit court, in order to bring the case to judgment and to determine any motions relating to the automatic stay of the judgment the Secretary of State of Florida was attempting to invoke.¹⁶ While the circuit court was considering motions to vacate the automatic stay, Nader, Camejo, and the Reform Party of Florida filed a petition in the United States District Court to remove the case to federal court, which was met with an emergency motion to remand the matter back to state court.¹⁷ The district court remanded the matter to state court, finding:

all of the counts raised in [Nader and Camejo's] complaint are grounded solidly in state law and thus do not raise a valid federal question sufficient to invoke the district court's jurisdiction; the defendants ha[ve] not met the unanimity requirement as [the Secretary of State of Florida] ha[s] not consented to the removal and she is a necessary and indispensable party to the case; and [Nader, Camejo and the Reform Party of Florida] waived their rights to remove the cause to federal court by invoking the jurisdiction of the Florida appellate courts and by participating in evidentiary hearings on the merits of the case.¹⁸

The circuit court concluded its final evidentiary hearing and issued a declaratory judgment finding that Nader and Camejo were not qualified under Florida law to appear on the ballot.¹⁹ "The court also permanently enjoined the Secretary of State from certifying Nader and Camejo on Florida's ballots, from instructing the county supervisors of elections to include their

13. *Id.* at 306.

14. *Reform Party of Fla.*, 885 So. 2d at 306.

15. *Id.*

16. *Id.* at 306-07.

17. *Id.* at 307.

18. *Id.*

19. *Reform Party of Fla.*, 885 So. 2d at 307-08.

names on the ballot, and from mailing any ballots pending further order of' the Supreme Court of Florida.²⁰

C. *Right to Regulate Elections by State*

The majority and concurring opinion recognized that "[a]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest."²¹ The majority also recognized that the United States Supreme Court has:

upheld generally applicable and even-handed restrictions that protect the integrity and reliability of the electoral process itself. The State has the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot, because it is both wasteful and confusing to encumber the ballot with the names of frivolous candidates.²²

However, as further detailed herein, the majority's decision concludes that the state regulation of election law requires the abdication of the interpretation of these state statutes by the courts when a presidential election is involved.²³

II. THE MAJORITY'S DECISION IS OVERSHADOWED BY THE 2000 ELECTION

The issue before the Supreme Court of Florida was whether the Reform Party of Florida and its purported nominees, Nader and Camejo, qualified to be placed on the general election ballot pursuant to section 103.021(4)(a) of the *Florida Statutes*.²⁴ Although the majority recognized that there was no question that Florida could "impose 'some burden' upon the access to the

20. *Id.* at 308.

21. *Id.* (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)); *id.* at 314 (quoting *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (citation omitted)).

22. *Id.* at 308 (citing *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983)). The butterfly ballots used in Palm Beach County during the 2000 presidential election caused much voter confusion. See, e.g., Rick Weiss, *Canadian Study Calls Butterfly Ballot 'Confusing,'* WASH. POST, Dec. 1, 2000, at A22; Gary Kane, *But More Marked Ballots for Gore*, PALM BEACH POST, Nov. 12, 2001, at 1AA.

23. See *Reform Party of Fla.*, 885 So. 2d at 308, 314.

24. *Id.* at 311.

ballot,”²⁵ it found that such burden had to be viewed in light of the United States Constitution.²⁶

The majority of the Supreme Court of Florida reversed the declaratory judgment and vacated the injunction.²⁷ In doing so, it recognized: (i) individuals have a constitutional right to associate and advance political beliefs; (ii) qualified voters have a constitutional right to cast votes effectively; (iii) states have an interest in encouraging compromise and political stability; and (iv) election regulation is required if they are to be fair, honest, and conducive to the maintenance of order.²⁸

The most disturbing aspect of the majority’s decision is its intellectual retreat from exercising traditional statutory analysis with respect to section 103.021(4)(a), justifying this retreat by relying on *Bush v. Palm Beach County Canvassing Board*.²⁹ In *Bush v. Gore*,³⁰ the United States Supreme Court reminded the litigants that “[t]he individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college.”³¹ The Court then unanimously vacated the Supreme Court of Florida’s decision which had required the Secretary of State of Florida to allow votes cast in the counties of Volusia, Palm Beach, Miami-Dade, and Broward, to be included in the certified tabulated 2000 election totals.³²

The Supreme Court of Florida’s decision was based upon Article I, Section 1 of the Florida Constitution,³³ which expressly states in relevant part “all political power is inherent in the people.”³⁴ The Supreme Court of Florida reasoned that any election law or action by an election official could not impose any “‘unreasonable or unnecessary’ restraints on the right of suffrage.”³⁵ In vacating the decision, the United States Supreme Court relied upon Article II, Section 1, Clause 2 of the United States Constitution³⁶ as the

25. *Id.* at 310 (quoting *Burdick*, 504 U.S. at 433).

26. *Id.* at 310–11 (citing *Williams v. Rhodes*, 393 U.S. 23, 28–29 (1968)).

27. *Id.* at 314.

28. *Reform Party of Fla.*, 885 So. 2d at 308 (citations omitted).

29. 531 U.S. 70 (2000) [hereinafter *Bush I*]; *Reform Party of Fla.*, 885 So. 2d at 308–09.

30. 531 U.S. 98 (2000) [hereinafter *Bush II*].

31. *Id.* at 104 (quoting U.S. CONST. art. II, § 1).

32. *Id.* at 101, 111.

33. Article I, Section 1 of the Florida Constitution provides: “All political power is inherent in the people. The enunciation herein of certain rights shall not be construed to deny or impair others retained by the people.” FLA. CONST. art. 1, § 1.

34. *Id.*

35. *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1236 (2000).

36. U.S. CONST. art. II, § 1, cl. 2.

authority to support its holding that the Supreme Court of Florida could not construe any Florida Statute in connection with a presidential election which would infringe upon the authority granted to state legislatures to choose the manner of selecting that state's presidential electors.³⁷ The Supreme Court of Florida refused to undertake traditional statutory analysis for section 103.021(4)(a) because in doing so the majority feared it "could run afoul of Article II, Section 1, Clause 2 of the United States Constitution."³⁸ As the majority reasoned, "although the judiciary has the power and authority to construe statutes, it cannot construe statutes in a manner that would infringe on the direct grant of authority to the Legislature through the United States Constitution."³⁹

The majority per curiam decision in *Bush II* made it unequivocally clear that the case was not to be cited as precedent.⁴⁰ Unfortunately, the same language of limitation was not included in *Bush I*.⁴¹ The same political crucible of the nation's closest presidential election which led to the outcome determinative reasoning of *Bush II* also drove the decision in *Bush I*.⁴² The case of *Reform Party of Florida* was not the first time the Supreme Court of Florida confronted Article II,⁴³ since November of 2000. It also confronted that Article in its remand decision from *Bush II*.⁴⁴ In that decision, the court noted that "[t]he 'intent of the voter' standard adopted by the Legislature was the standard in place as of November 7, 2000,"⁴⁵ and the court would not concede on remand from *Bush II* that to establish standards for the determination of a legal vote in accordance with the then-existing legislation would

37. See *Bush I*, 531 U.S. at 76 (holding that a legislature may take action to disenfranchise a voter or group of voters in the Presidential election which, while unconstitutional under the Florida Constitution, would be constitutional under the Federal Constitution.).

38. *Reform Party of Fla.*, 885 So. 2d at 313.

39. *Id.* at 312; cf. *Fla. Democratic Party v. Hood*, 884 So. 2d 1148, 1149–51 (Fla. 1st Dist. Ct. App. 2004) (considering whether or not Florida's executive branch violated section 120.54(4) of the *Florida Statutes* and Article II, Section 1, Clause 2 of the United States Constitution by issuing an emergency rule restricting recounts of electronic voting machines one business hour prior to the commencement of early voting in the general election); Petitioner's Brief on the Merits at 7, *Fla. Democratic Party v. Hood*, 888 So. 2d 622 (Fla. 2004) (No. SC04-2072). However, the Supreme Court of Florida refused to address this question by declining to consider the petition for review of the emergency rule after "having determined that it should decline to exercise jurisdiction." *Fla. Democratic Party v. Hood*, No. SC04-2072, 2004 Fla. LEXIS 2043, at *1 (Fla. Nov.10, 2004).

40. See *Bush II*, 531 U.S. at 109. "Our consideration is limited to the present circumstances . . ." *Id.*

41. See *Bush I*, 531 U.S. at 70.

42. *Id.*

43. U.S. CONST. art. II, § 2, cl. 1.

44. See *Gore v. Harris*, 773 So. 2d 524 (Fla. 2000).

45. *Id.* at 526.

have violated Article II of the Federal Constitution.⁴⁶ So, why did the Supreme Court of Florida refuse to establish standards for ballot access in the *Reform Party of Florida* case when it had previously expressly reserved its right to interpret state statutes consistent with its responsibility as a court and Article II?⁴⁷

Certainly any review of the history and meaning of Article II prior to *Bush I* would have comforted the Supreme Court of Florida in performing its traditional role as a court in interpreting section 103.021(4)(a) of the *Florida Statutes*.⁴⁸ As previously stated in an article co-authored by one of these authors:

The United States Supreme Court's "direct grant of authority" view contemplates that the states relinquished the power to select presidential electors to the federal government at the Constitutional Convention and then, in an act of charitable benevolence, the federal government donated that power to the states. Under such logic, the federal government can "direct[ly] grant" the authority to select electors to a specific entity of the several states, namely the legislature. However, Article II, Section 1, Clause 2, rather than being a "direct grant" of authority, is a reservation of power by the states. The text of the clause itself supports this proposition. The Constitution establishes that "[e]ach State shall appoint" presidential electors, textually recognizing that the power to select presidential electors lies in the several states.

....

The text of title 3, section 5 of the *United States Code* supports this view. Apparently, when creating section 5, Congress believed that the federal constitution contemplates a state legislature delegating issues of enforcement and interpretation to a co-ordinate branch of government.

....

... [U]nlike the federal government, the several states are independent sovereigns with all the inherent powers of common

46. *Id.* at 526. "[T]he per curiam decision in *Bush v. Gore* acknowledged that the Supreme Court of Florida had the 'power to assure uniformity.'" Mitchell W. Berger & Candice D. Tobin, *Election 2000: The Law of Tied Presidential Elections*, 26 NOVA. L. REV. 647, 846 (2002) (citing *Bush II*, 531 U.S. at 109); see also *Gore*, 773 So. 2d at 526.

47. See *Reform Party of Fla. v. Black*, 885 So. 2d 303, 313 (Fla. 2004).

48. FLA. STAT. § 103.021(4)(a) (2004).

law sovereignty, absent those relinquished to the federal government. State constitutions are limitations on the inherent sovereign power of states created by the people of that state.

. . . Those limitations operate when the Florida Legislature selects the manner to appoint electors. Therefore, if a law of the Florida Legislature operates in a manner that violates one of the paramount rights of the people of the State of Florida, then the legislature is subverting the sovereign limitations set forth by the people of Florida. . . .

Essentially, the federal constitution “takes state legislative bodies as it finds them—subject to pre-existing control by the people of each state, the ultimate masters of the state legislatures—and the state constitutional limits that those people create. As a result, the United States Supreme Court’s expression that the Florida Constitution may have “circumscribe[d] the legislative power” provided by Article II, Section 1, Clause 2 rests on the faulty premise that this clause gives the Florida Legislature power that the people of Florida had not granted it.”⁴⁹

Instead of performing a traditional statutory analysis and reviewing the record in the *Reform Party of Florida* case, the majority reasoned that “the determination of whether [a] candidate qualifies under section 103.021(4)(a) by claiming to be a ‘minor political party that is affiliated with a national party holding a national convention to nominate candidates for President and Vice President’ involves a legal determination.”⁵⁰ This reasoning is unsupported by citation, but appears to stem from the court’s Article II concerns.⁵¹ Against this backdrop, the majority concluded that “we have been unable to ascertain whether the Legislature intended for the statutory terms to have a strict or broad meaning. In the absence of more specific statutory criteria or

49. Berger & Tobin, *supra* note 46, at 689–92 (citations omitted). Title 3, section 5 of the *United States Code* further provides:

If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its *final determination of any controversy or contest* concerning the appointment of all or any of the electors of such State, *by judicial or other methods or procedures*, and such determination shall have been . . . made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such a State is concerned.

Id. at 690 (quoting 3 U.S.C. § 5 (2000)) (emphasis added).

50. *Reform Party of Fla.*, 885 So. 2d at 311.

51. *See id.* at 312.

guidance from the Legislature we are unable to conclude that a statutory violation occurred.”⁵²

A. *The Concurrence of Justice Lewis*

While Justice Lewis concurs in the result, he undertakes a traditional statutory analysis performed by appellate courts on appeal.⁵³ Expressly disagreeing with the majority’s analysis, Justice Lewis held:

I cannot at all agree with the analysis and reasoning of the majority. The right to vote is a fundamental and essential part of our constitutional democracy and is subject to reasonable regulation. The United States Supreme Court made this apparent in *Burdick v. Takushi*, 504 U.S. 428, 433 ... (1992), when it stated:

It is beyond cavil that voting is of the most fundamental significance under our constitutional structure. It does not follow, however, that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute. *The Constitution provides that States may prescribe “[t]he Times, Places and Manner of holding Elections for Senators and Representatives,” Art. I, § 4, cl. 1, and the Court therefore has recognized that States retain the power to regulate their own elections.* Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.⁵⁴

Justice Lewis rejected Article II as being a limitation on the state retaining the power, including through its judicial branch “to regulate their own elections.”⁵⁵ As Justice Lewis stated:

Although minor political parties most certainly do have a right to be on the ballot, courts have consistently held that this right is not absolute and without restrictions. . . . Our system is legislatively designed so that minor parties affiliated with a national party holding a national convention, *see* § 103.021(4)(a), Fla. Stat. (2003),

52. *Id.* at 314.

53. *See id.*

54. *Id.* (emphasis added) (citations omitted in original).

55. *Reform Party of Fla.*, 885 So. 2d at 314 (quoting *Burdick v. Takushi*, 504 U.S. 428, 433 (1992)).

are treated differently than minor parties that are not affiliated with a national party holding a national convention, *see* § 103.021(4)(b), Fla. Stat. (2003). To construe subsection (4)(a) as the majority does today is nothing less than this Court basically rewriting the statute and using a judicial eraser to strip section (4)(a) of the same dignity this Court has afforded the petition requirement in subsection (4)(b) [Justice Lewis then declares that] [t]here is no administrative remedy afforded under these circumstances and, therefore, it necessarily falls on the shoulders of the judiciary to determine the rights of the parties in this dispute by interpreting and applying the statute.⁵⁶

Justice Lewis proceeded to analyze the language in the statute through traditional means and concluded that under a traditional statutory analysis employed by courts and reviewing courts, “[i]n my view, the determinations made by the trial court are eminently correct based on the evidence and arguments presented.”⁵⁷

B. *Supreme Court of Florida Fails to Construe the Florida Statute*⁵⁸

After considering the evidence presented, the trial court found that Nader and Camejo as candidates of the Reform Party of Florida, were not

56. *Id.* at 315–16 (emphasis added).

57. *Id.* at 317. In concluding that the trial court was correct in finding that the Reform Party was not a national party and that it did not hold a national convention, Justice Lewis refers to the dictionary as required by prior precedent and says: “A simplistic approach by reference to textual material demonstrates that *Black’s Law Dictionary* defines ‘national’ as ‘[o]f or relating to a nation’ and ‘nationwide in scope.’” *Id.* at 318. The majority dismisses definitions set forth in various dictionaries as providing little guidance. *Id.* at 312.

58. Interestingly, the Florida Secretary of State’s position was that her function was “purely ministerial” and therefore she had “no basis to look behind the certificate [submitted by Nader and Camejo] to determine [whether] the party meets the statutory criteria.” *Reform Party of Fla.*, 885 So. 2d at 311. However, if the Secretary’s function is purely ministerial, then how does the Secretary determine whether a petition was signed by one percent of the registered voters of Florida under section 103.021(4)(b) of the *Florida Statutes*? The Secretary’s position would effectively eliminate the need for section 103.021(4)(b), *Florida Statutes*, because all potential presidential candidates would only need to submit a certificate under section 103.021(4)(a). See the dissenting opinion of Justice Anstead approving the trial court’s reasoning that:

in enacting section 103.021(4)(a), Florida Statutes, the Legislature surely did not intend the standards for national party, minor party, and national nominating convention to be meaningless. As the trial court noted, “it doesn’t seem . . . to make any sense that the Legislature would have a provision in the law that says you can get on the ballot as a minor party by getting a . . . great number of signatures, and then have another way that’s basically no requirements.”

Id. at 321 (Anstead, J., dissenting).

legally qualified pursuant to section 103.021(4)(a), *Florida Statutes*, to appear on the ballot because: 1) Reform Party USA was not a “national party;” and 2) Nader and Camejo were not nominated in a “national convention.”⁵⁹

The Supreme Court of Florida summarized its position indicating that section 103.021(4)(a) of the *Florida Statutes* did not define the terms “national party” or “national convention,” concluding therefore that “the Reform Party of Florida was not on notice that these terms were to be interpreted in accordance with any specific criteria and certainly not the criteria utilized by the trial court.”⁶⁰ Further, “[i]n the absence of more specific statutory criteria or guidance from the Legislature [they were] unable to conclude that a statutory violation occurred.”⁶¹ The majority then stated that it “urge[s] the Legislature to revisit this important issue at its earliest opportunity.”⁶²

In making its decision, the majority indicated that it was being mindful of the First Amendment to the United States Constitution providing individuals the right to associate for the advancement of political beliefs as well as the state legislature’s exclusive power to determine how the electors of Florida are chosen, citing to Article II, Section 1, Clause 2 of the United States Constitution.⁶³ The majority indicated that “although the judiciary has the power and authority to construe statutes, it cannot construe statutes in a manner that would infringe on the *direct grant of authority to the Legislature* through the United States Constitution.”⁶⁴ However, as previously noted, this is impossible since the federal government, which was not yet formed in 1789, could not give a direct grant of authority to state legislatures.⁶⁵ In 1789, it was the state legislatures at the Constitutional Convention, who reserved the power to appoint state electors.⁶⁶ This is critical because if states

59. *Id.* at 305.

60. *Id.* at 314.

61. *Id.*

62. *Reform Party of Fla.*, 885 So. 2d at 314.

63. *Id.* at 311–12. Article II provides, “[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress.” U.S. CONST. art. II, § 1, cl. 2.

64. *Reform Party of Fla.*, 885 So. 2d at 312 (emphasis added).

65. *See supra* Part II.

66. *See* THE FEDERALIST NO. 32, at 241 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961) (stating “the State governments would *clearly retain* all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States”) (emphasis added); *see also* THE FEDERALIST NO. 39, at 285 (James Madison) (Benjamin Fletcher Wright ed., 1961) (“[T]he proposed government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects”); *see also* THE FEDERALIST NO. 40, at 290 (James Madison) (Benjamin Fletcher Wright ed., 1961) (“[T]he

reserved this power, they also generally reserved for the state's statutes to be interpreted in normal course by its courts.

The majority focused on the term "national party" and essentially disregarded the other statutory requirement for the candidates to have been nominated by a national party "holding a national convention."⁶⁷ More specifically, the majority indicated that section 103.021(4)(a) of the *Florida Statutes* does not define "national party."⁶⁸ It reviewed the dictionary, noting the term was not defined therein,⁶⁹ then went on to analyze the term "national party" by comparing the definitions in other states' statutes, concluding that "there is no consensus on what constitutes a national party."⁷⁰ The majority went on to discuss an advisory opinion issued by the Federal Election Commission (FEC) which discussed criteria it used in determining whether a political party has "demonstrated sufficient activity on a national level to attain national committee status."⁷¹ Such criteria included: "(1) the party's nomination of candidates for various Federal offices in numerous states; (2) the party's engagement in certain activities on an ongoing basis[;]" and "(3) the party's publicization of issues of importance to the party and its adherents throughout the nation."⁷² However, despite evidence that the Reform Party USA "lost its status as a national party because it no longer" had support, "almost eliminated fundraising," and only had candidates for federal office (other than President) in two other states, the court indicated that it could not conclude that the Florida Legislature intended to incorporate the FEC's standards in connection with the term "national party" included in the Florida Statute, because the "FEC's interest relates to the integrity of campaign fundraising access, whereas the state's interest lies in protecting the integrity of the ballot."⁷³

The court barely mentioned the dispute as to whether Nader and Camejo were nominated in a "national convention" by their purported na-

States, in all unenumerated cases, are left in the enjoyment of their sovereign and independent jurisdiction").

67. *Reform Party of Fla.*, 885 So. 2d at 310.

68. *Id.* at 312.

69. *Id.* However, the term "party" has been defined as "a group of persons with common political opinions and purposes organized for gaining political influence and governmental control and for directing government policy." RANDOM HOUSE UNABRIDGED DICTIONARY 1416 (2d ed. 1993). The adjective "national" has been defined as "of, pertaining to, or maintained by a nation as an organized whole or independent political unit." *Id.* at 1279. Although each word is defined separately, the majority did not expend much effort to interpret the words using a common sense approach.

70. *Reform Party of Fla.*, 885 So. 2d at 312-13.

71. *Id.* at 313.

72. *Id.*

73. *Id.*

tional party and noted that “some type of meeting occurred.”⁷⁴ As clearly indicated in section 103.021(4) of the *Florida Statutes*, unless a Presidential or Vice-Presidential candidate is part of a minor party affiliated with a national party holding a national convention, such candidate must obtain a petition containing the signatures of one percent of Florida’s registered voters in order to appear on the general election ballot.⁷⁵ The majority held that gathering signatures involved a pure question of objectively verifiable fact, yet indicated that the determination of whether a candidate qualifies under section 103.021(4)(a) of the *Florida Statutes* involved a legal determination.⁷⁶

However, it is apparent that party affiliation and whether a “national convention” was held are factual determinations,⁷⁷ which is precisely why the trial court considered evidence in making its finding that Nader and Camejo did not qualify under Florida law to appear on the general election ballot.⁷⁸ Even if the term “national party” were ambiguous, as aptly stated by Justice Lewis in his concurring opinion, “[t]he Judiciary must . . . give life to the legislative words.”⁷⁹

Our system is legislatively designed so that minor parties affiliated with a national party holding a national convention, *see* § 103.021(4)(a), Fla. Stat. (2003), are treated differently than minor parties that are not affiliated with a national party holding a national convention, *see* § 103.021(4)(b), Fla. Stat. (2003). To construe subsection (4)(a) as the majority does today is nothing less than this Court basically rewriting the statute and using a judicial

74. *Id.* at 314. The “national convention” was an endorsement of Nader and Camejo via a telephone conference call which did not follow the Reform Party’s own definition of “national convention.” *Reform Party of Fla.*, 885 So. 2d at 305. According to Black’s Law Dictionary, “convention” is defined as “[a]n assembly or meeting of members belonging to an organization or having a common objective,” the term “national” as “[o]f or relating to a nation” or “nationwide in scope” and the term “assembly” as “[a] group of persons organized and united for some common purpose.” BLACK’S LAW DICTIONARY 124, 355 1050 (8th ed. 2004). It is hard to conclude a plain reading of the words “national convention” would be interpreted to include a conference call, let alone a call of the type which the record indicates occurred in this case. *Reform Party of Florida*, 885 So. 2d at 305.

75. FLA. STAT. § 103.021(4) (2004).

76. *Reform Party of Fla.*, 885 So. 2d at 311; *see also* FLA. STAT. § 103.021(4)(a).

77. *See id.* at 319 (Lewis, J., concurring). In his concurrence, Justice Lewis noted that “[n]o matter what definition one may establish as to ‘national’ under this statute, there would be a factual question regarding whether the entity or group satisfies that definition, which the majority summarily rejects.” *Id.* (Lewis, J., concurring).

78. *See id.* at 305.

79. *Id.* at 317–18 (Lewis, J., concurring).

eraser to strip section (4)(a) of the same dignity as this Court has afforded the petition requirement in subsection (4)(b).⁸⁰

In sum, despite the fact that the majority acknowledged that there was a “lengthy evidentiary hearing, that included receipt of documentary evidence and arguments from the parties,”⁸¹ the majority decision failed to give deference to the findings of fact made by the trial court.⁸² Justice Lewis, in his concurrence, noted that “[t]he majority, in my view, fails to even consider that there is a factual component as to whether one satisfies the legal criteria of a statute.”⁸³

C. *Other Concerns – Is the Florida Statute Void for Vagueness?*

If the majority of the Supreme Court of Florida and the Secretary of State are correct that the Reform Party of Florida was not on notice of the interpretation of the terms “national party” and “national convention,” is the statute void for vagueness?

The United States Supreme Court has held that with respect to whether a statute is void for vagueness,

generally . . . decisions of the court upholding statutes as sufficiently certain, rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them . . . or a well-settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ . . . or, as broadly stated by Mr. Chief Justice White . . . “that, for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded.”⁸⁴

Similarly, under Florida law, a statute “will not be declared vague unless the statute fails to give persons of ordinary intelligence fair notice of what constitutes the forbidden conduct and which, because of imprecision, may invite arbitrary and discriminatory enforcement.”⁸⁵ In analyzing

80. *Reform Party of Fla.*, 885 So. 2d at 315 (Lewis, J., concurring).

81. *Id.* at 310.

82. *Id.* at 317 (Lewis, J., concurring).

83. *Id.* (Lewis, J., concurring).

84. *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391–92 (1926) (citations omitted).

85. *State v. Delgrasso*, 653 So. 2d 459, 462 (Fla. 2d Dist. Ct. App. 1995); *see also* *Gluhareff v. State*, 888 So. 2d 733 (Fla. 5th Dist. Ct. App. 2004) (finding statute was “sufficiently

whether a statute is void for vagueness courts first determine whether the statute fairly gives notice to those it seeks to bind of its strictures.⁸⁶ Second, courts determine whether the statute is precise enough as to not invite the arbitrary and discriminatory enforcement thereof.⁸⁷ If the statute provides both fair notice and is sufficiently precise, it will be upheld.⁸⁸ However, if either determination is negative, the statute will be found void for vagueness.⁸⁹

The majority concluded “we are left with a statute that does not have its critical terms defined or standards set for ascertaining compliance with the statute. We thus urge the Legislature to revisit this important issue at its earliest opportunity.”⁹⁰ However, Justice Lewis’ concurrence indicates that the statute was capable of interpretation, noting:

[t]he trial court, without the benefit of a specific definition of “national,” probed the parameters of what a “national party” holding a “national convention” really was intended to and actually encompassed.

....

... [T]he trial judge had not only competent and substantial evidence to support his findings but also the only evidence presented supported the conclusion that this is not a “national party” within the purview of the controverted statute.⁹¹

Justice Lewis further noted:

[n]otwithstanding that there may be various inflections of what a word may mean, an overly technical approach would result in no word ever having an acceptable or legally sufficient definite mean-

specific to give notice and adequate warning to persons of common intelligence of the conduct that is proscribed” despite the statute’s failure to define the term “under the influence”).

86. See *Delgrasso*, 653 So. 2d at 462–63.

87. See *id.* at 462.

88. See, e.g., *United States v. Powell*, 423 U.S. 87, 92–93 (1975) (upholding a statute prohibiting the mailing of concealable firearms because it established a “reasonably ascertainable standard of conduct” and because it provided notice to the citizens as to what actions are proscribed by the statute).

89. See *id.*

90. *Reform Party of Fla. v. Black*, 885 So. 2d 303, 314 (Fla. 2004).

91. *Id.* at 317 (Lewis, J., concurring).

ing or understanding. A word does not necessarily need to be defined by precise elements to have a common understanding.⁹²

Yet Justice Lewis concurred in the result finding that “it may be properly advanced that the appellants were not afforded adequate notice as to what constituted a ‘national party’” under the statute, thereby implicating Nader and Camejo’s due process rights.⁹³

If the majority and Justice Lewis found that the Florida Statute was not sufficiently clear to put Nader and Camejo on notice with respect to whether they could qualify to be placed on the ballot, under the standards established by the United States Supreme Court, the statute should have been deemed void under the void for vagueness doctrine as being violative of Nader and Camejo’s due process rights.⁹⁴ Such a finding would have produced a similar result—Nader and Camejo would have been placed on the ballot.⁹⁵ However, both the majority and the concurrence failed to recognize the statute as void based upon the rationale that the term “national party” was not defined in the statute and therefore did not provide notice to Nader and Camejo on how such term would be interpreted and applied to them.⁹⁶ This logic is clearly flawed as the trial court made specific findings on the issue based upon the evidence presented, which the majority failed to recognize and which Justice Lewis inexplicably found to be correct, yet concurred in the result reached by the majority.⁹⁷

III. CONCLUSION

Unfortunately, the Court failed to adjudicate the rights of the parties through interpretation and application of the appropriate statute. Justice Anstead, in his dissent, echoes Justice Lewis stating:

[a]s the trial court noted, “it doesn’t seem . . . to make any sense that the Legislature would have a provision in the law that says you can get on the ballot as a minor party by getting a . . . great

92. *Id.* at 319 (Lewis, J., concurring).

93. *Id.*

94. *See Powell*, 423 U.S. at 92.

95. *See id.*

96. *See Reform Party of Fla. v. Black*, 885 So. 2d 303, 314–19 (Fla. 2004) (Lewis, J., concurring).

97. *See id.*

number of signatures, and then have another way that's basically no requirements."⁹⁸

This is precisely the result that the Supreme Court of Florida has created by avoiding its responsibility to act as an appellate court. However, the co-authors of this Section of this article submit that the constitutional amendment proposed by Mr. Anderson in Section III of this article, would prevent the courts from being confronted with making decisions that fail to apply the law.

98. *Id.* at 321 (Anstead, C.J., dissenting).

SECTION III: A REVIEW OF FLORIDA'S BALLOT ACCESS LAW IN LIGHT OF *REFORM PARTY OF FLORIDA v. BLACK*

JOHN ANDERSON

In *Reform Party of Florida v. Black*, the Supreme Court of Florida upheld the decision of the Secretary of State, Glenda Hood, to place the names of Ralph Nader and Peter Camejo on the 2004 Florida presidential ballot as candidates of the Reform Party of the United States of America.⁹⁹ This action reversed the decision of the Circuit Court for the Second Judicial Circuit of Florida, which had ordered the removal of their names from the ballot.¹⁰⁰ The circuit court ruled in favor of the plaintiffs, who argued that Nader and Camejo were spurious candidates of a "minor party" who were not actually affiliated with a national party.¹⁰¹ National affiliation of candidates on Florida ballots is required by section 103.021(4)(a) of the *Florida Statutes*.¹⁰² The gravamen of the complaint, which numbered registered Democrats and Republicans, as well as Florida residents, was that the above-cited section of the *Florida Statutes* was inapplicable because the Reform Party of Florida had no actual affiliation with the national party.¹⁰³

In its ruling, the lower court further found that despite its name, the Reform Party USA was not a "national party," and therefore the Reform Party of Florida could not be affiliated with a non-existent entity.¹⁰⁴ Among its other findings was one in which the circuit court concluded that Nader and Camejo were not nominees of a "national convention" because they were nominated via a conference call which violated the Reform Party USA's own prescribed procedures.¹⁰⁵

In its opinion, the Supreme Court of Florida also cited three United States Supreme Court decisions involving ballot access, one of which, *Storer v. Brown*,¹⁰⁶ refers to "the substantial state interest in encouraging compromise and political stability, in attempting to ensure that the election winner

99. 885 So. 2d 303, 304 (Fla. 2004).

100. *Id.* at 304–05.

101. *Id.* at 305; *see generally* FLA. STAT. § 103.021(4)(a) (2004).

102. § 103.021(4)(a).

103. *Reform Party of Fla.*, 885 So. 2d at 305. One of the Florida residents was registered as Independent and one was a registered member of the Reform Party of Florida. *Id.* at 304.

104. *See id.* at 305.

105. *Id.* It should be of more than passing interest that the defendants in this litigation sought to remove the case to federal court because a federal question was involved but were rebuffed by the United States District Court for the Northern District of Florida on the grounds that all of the counts in the plaintiffs' complaint were firmly anchored in state law. *Id.* at 307.

106. 415 U.S. 724 (1974).

will represent a majority of the community and in providing the electorate with an understandable ballot.”¹⁰⁷

In its per curiam opinion, the Supreme Court of Florida further cites *Storer v. Brown* as holding: “[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.”¹⁰⁸

The Supreme Court of Florida then stated:

Thus, the United States Supreme Court has “upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself. The State has the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot, because it is both wasteful and confusing to encumber the ballot with the names of frivolous candidates.”¹⁰⁹

The principal point to be made here, in analyzing the proper role for the judicial branch of state government in deciding questions involving presidential ballot access, is that a unique national interest is involved. After all, the presidential office is completely unlike the thousands of elected state and federal offices that are involved in the electoral process. It is therefore the singular nature of those offices—the President and the Vice-President—that overshadows any effort at the state level to design the ballot and to establish fixed rules that focus on efforts by individuals to gain access to the ballots that are prepared quadrennially to give the American voter the right to choose their top two national leaders.

107. *Id.* at 729 (citing *Williams v. Rhodes*, 393 U.S. 23, 32 (1968)); *Reform Party of Fla.*, 885 So. 2d at 308.

108. *Reform Party of Fla.*, 885 So. 2d at 308 (quoting *Storer*, 415 U.S. at 730).

109. *Id.* (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788–89 n.9 (1983) (citations omitted) [hereinafter *Anderson II*]). It should be noted at this point that *Anderson II* was also cited in another per curiam opinion, *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring). This was unquestionably the most bitterly contentious opinion dealing with the electoral process in the entire history of the United States Supreme Court. See generally *Bush v. Gore*, 531 U.S. 98 (2000). Chief Justice Rehnquist, with whom Justices Scalia and Thomas joined in concurring, stated in that case:

Likewise, in *Anderson v. Celebrezze*, we said: “[I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation.”

Id. at 112 (citation omitted).

I. INTRODUCTORY NOTE

The co-author of this article writes from the perspective of one who formally abandoned our venerable two-party system a quarter of a century ago. I did so by declaring myself an Independent candidate for our nation's highest office. I was immediately confronted with the multiple problems of ballot access, and this resulted in multiple lawsuits in federal and state courts with one, the eponymous *Anderson v. Celebrezze*,¹¹⁰ reaching the United States Supreme Court.¹¹¹ In 1980, the United States District Court for the Southern District of Ohio ruled correctly in allowing me to gain access to the Ohio ballot, and validating my claim that I truly was a national candidate having achieved ballot access in all states.¹¹² For those interested in a detailed account of my entire adventure I refer you to *Jumping Through 51 Hoops: John Anderson's Struggle for Ballot Access and Its Effect on the Rights of Independent and Third Party Candidates*.¹¹³

My contribution to this article is not, as should become apparent to the reader, a reprise of that effort. Nevertheless, a quarter of a century after that experience, my deeply held feeling is that despite a plethora of changes in the laws relating to the electoral process, insufficient progress has been made. Progress is essential to right the wrongs of a system so firmly held within the implacable grasp of a two-party duopoly, that it causes independents and minor parties to become victims of a "partisan lockup" (to use the phrase of two prominent critics of many features of our current electoral structure).¹¹⁴

At the very outset of my contribution to this commentary on Florida's ballot access law, as it was construed in the case of *Reform Party of Florida v. Black*, I wish to associate myself strongly with the views of the distinguished political scientist, Morris P. Fiorina, in his celebrated article, *The Decline of Collective Responsibility in American Politics*.¹¹⁵ In the article, Fiorina pays respect to the Framers, who emphasized in the structured ar-

110. 664 F.2d 554 (6th Cir. 1981) [hereinafter *Anderson I*].

111. *Anderson II*, 460 U.S. at 780.

112. *Anderson v. Celebrezze*, 499 F. Supp. 121 (D. Ohio 1980), *rev'd*, 664 F.2d 554 (6th Cir. 1981), *rev'd*, 460 U.S. 780 (1983).

113. See Rebbecca Landis, *Jumping Through 51 Hoops: John Anderson's Struggle for Ballot Access and Its Effect on the Rights of Independent and Third Party Candidates* (1985) (unpublished thesis, University of Texas) (on file with author).

114. Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998); see generally *Reform Party of Fla. v. Black*, 885 So. 2d 303 (Fla. 2004).

115. Morris P. Fiorina, *The Decline of Collective Responsibility in American Politics*, 109 DAEDALUS 25 (1980).

rangements they conceived and embodied in our Constitution, that government should be workable but not all powerful.¹¹⁶ This resulted in a federal system that is deeply concerned about the government's power, hemmed in by checks and balances, all based on the Framers' prior experiences.¹¹⁷ Because of this concern, they were predisposed to a system that would maintain a status quo.¹¹⁸ But writing almost 200 years later, in 1980, Fiorina felt that it now behooves us to "worry about our ability to make government work for us. The problem is that we are gradually losing that ability, and a principal reason for this loss is the steady erosion of *responsibility* in American politics."¹¹⁹

II. THE TWO PARTY SYSTEM'S EFFECT ON THE ELECTORAL PROCESS

The subsequent repudiation by the United States Supreme Court of the Supreme Court of Florida's assertion of the plenary nature of the right of the individual voter to vote for President and Vice-President of the United States occurred in its per curiam opinion in *Bush I*.¹²⁰ The Court vacated the Supreme Court of Florida's order, relying heavily on *McPherson v. Blacker*.¹²¹ In *McPherson*, the Court, more than a century before, stated:

[Art. II, § 1, cl. 2] does not read that the people or the citizens shall appoint, but that "each State shall"; and if the words "in such manner as the legislature thereof may direct," had been omitted, it would seem that the legislative power of appointment could not have been successfully questioned in the absence of any provision in the state constitution in that regard. Hence the insertion of those words, while operating as a limitation upon the State in respect of any attempt to circumscribe the legislative power, cannot be held to operate as a limitation on that power itself.¹²²

Thus, the United States Supreme Court, at least as it is presently composed, is firmly in lockstep with a body of precedent dating back more than a century which holds that the state legislature retains the power to determine the election to the Presidency of the United States, not the people.¹²³ Indeed,

116. *Id.* at 25.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000) [hereinafter *Bush I*].

121. *Id.* at 76, 78 (citing *McPherson v. Blacker*, 146 U.S. 1, 25 (1892)).

122. *McPherson*, 146 U.S. at 25.

123. *See Bush I*, 531 U.S. at 76-78.

the Court in *Bush I* made it abundantly clear that a principal reason for the remand was its dubiety regarding the portion of the Supreme Court of Florida's opinion that stated: "[b]ecause the right to vote is the pre-eminent right in the Declaration of Rights of the Florida Constitution" it should circumscribe any laws governing the electoral process.¹²⁴ The Supreme Court of Florida further stated that "election laws are intended to facilitate the right of suffrage"¹²⁵ and therefore, laws that regulate the electoral process "are valid only if they impose no 'unreasonable or unnecessary' restraints on the right of suffrage."¹²⁶ The Supreme Court of Florida then cited *Treiman v. Malmquist*¹²⁷ which stated:

the declaration of rights expressly states that "all political power is inherent in the people." The right of the people to select their own officers is their sovereign right, and the rule is against imposing unnecessary and unreasonable disqualifications to run. . . . Unreasonable or unnecessary restraints on the elective process are prohibited.¹²⁸

The Supreme Court of Florida then stated:

[b]ecause election laws are intended to facilitate the right of suffrage, such laws must be liberally construed in favor of the citizens' right to vote:

Generally, the courts, in construing statutes relating to elections, hold that the same should receive a liberal construction in favor of the citizen whose right to vote they tend to restrict and in so doing to prevent disfranchisement of legal voters and the intention of the voters should prevail when counting ballots. . . . It is the intention of the law to obtain an honest expression of the will or desire of the voter.¹²⁹

Courts must not lose sight of the fundamental purpose of election laws: [t]he laws are intended to facilitate and safeguard the right of each voter to express his or her will in the context of our represen-

124. See *id.* at 75–78; *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1239 (Fla. 2000).

125. *Harris*, 772 So. 2d at 1237.

126. *Id.* at 1236.

127. 342 So. 2d 972 (Fla. 1977).

128. *Id.* at 975 (citations omitted).

129. *Harris*, 772 So. 2d at 1237 (quoting *State ex. rel. Carpenter v. Barber*, 198 So. 49 (Fla. 1940)).

tative democracy. Technical statutory requirements must not be exalted over the substance of this right.¹³⁰

The Court's opinion in *Bush I*,¹³¹ asserting the potential federal interest, laid the foundation for *Bush II*,¹³² which decided the election of 2000.¹³³ This was only accomplished by overriding the textual commitment of the Florida State Constitution, which gives primacy to the wish and intent of the individual voter in deciding *any* presidential election contest.¹³⁴ The Court accomplished this by an invocation of Article II, Section 1, Clause 2 of the United States Constitution, as well as a failure to comply with title 3, section 5 of the *United States Code*.¹³⁵ A further ground, of course, was the Court's reliance on the Equal Protection Clause of the United States Constitution.¹³⁶

Bush II is perhaps best remembered for its sweeping assertion that "[t]he individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college,"¹³⁷ citing then to the United States Constitution, Article II, Section 1.¹³⁸ The Court continued, citing *McPherson v. Blacker*,¹³⁹ as its authority for the additional conclusion that "the state legislature's power to select the manner for appointing electors is plenary; it may, if it so chooses, select the electors itself."¹⁴⁰ Although the Court acknowledged that current practice has seen citizens rather than, as was the practice for many years, state legislatures voting for electors, it is not the constitutional right of voters to do so, and the primacy of the state legislatures' power could be asserted at any time and in any presidential election.¹⁴¹

We turn now to the relevance of these judicial precedents arising out of the 2000 presidential election, to the controversy which arose in the 2004 election over ballot access for a candidate for the presidency, Ralph Nader, which led to the decision of the Supreme Court of Florida in *Reform Party of*

130. *Id.* (footnotes omitted).

131. 531 U.S. 70 (2000).

132. 531 U.S. 98 (2000); *see also Bush I*, 531 U.S. 70 (2000).

133. *The Presidential Election Is Finally Done*, WASH. POST, Dec. 14, 2000, at C15, 2000 WL 29921494.

134. *See* FLA. CONST. art VI, § 1.

135. U.S. CONST. art II, § 1, cl. 2; 3 U.S.C. § 5 (2000); *Bush v. Gore*, 531 U.S. 98, 104, 110 (2000).

136. U.S. CONST. art XIV, § 1; *Bush II*, 531 U.S. at 104–05.

137. *Bush II*, 531 U.S. at 104.

138. *Id.*; U.S. CONST. art II, § 1, cl. 3.

139. 146 U.S. 1 (1892).

140. *Bush II*, 531 U.S. at 104 (citing *McPherson*, 146 U.S. at 33).

141. *Id.* (citing *McPherson*, 146 U.S. at 35).

Florida v. Black, on September 17, 2004.¹⁴² The court had to interpret a statute allowing a non-major party candidate to gain ballot access by becoming the candidate of a minor party, affiliated with a national party, holding a national convention to nominate candidates for President and Vice President.¹⁴³ Some of the 1999 revisions to the Florida ballot access law provided for filing a list of the required number of persons to serve as electors.¹⁴⁴

The ensuing litigation over the Nader candidacy and its choice of this route to ballot access, rather than use of a petitioning process, yielded a decision in Nader's favor.¹⁴⁵ However, Justice Lewis, concurring in the result only, disagreed sharply with both the "analysis and reasoning of the majority."¹⁴⁶ He specifically lamented at great length the statute's failure to define what constitutes a "national party."¹⁴⁷ And although he does not dwell upon what can legitimately constitute a national nominating convention,¹⁴⁸ especially in the age of the internet, where so much of business and commerce is electronically conducted, it would perhaps be a daunting task to determine whether or not an appropriate definition of a political convention would even be achievable. I mention this because the plaintiffs in the *Reform Party of Florida* made much of the nomination being the product of a telephone call.¹⁴⁹

Perhaps, as Justice Lewis correctly observed in his concurrence, the question of what constitutes a party was itself difficult enough.¹⁵⁰ However, it is the anterior question, namely, the difficulties that surround the efforts of parties (other than the two major parties) constituting a duopoly of power to gain entrance to the political marketplace, which is the precise task that will be undertaken and explored in this portion of the commentary on the Supreme Court of Florida's decision. This necessarily involves a discussion of the political rights of independent and third party members who would seek to challenge the present hierarchy of the two party system. This requires at least a brief recitation of prior history and how this duopoly has flourished under the United States Constitution over more than the last century and a half.

142. 885 So. 2d 303 (Fla. 2004).

143. *Id.* at 305.

144. FLA. STAT. § 103.021(4)(a) (1999).

145. *Reform Party of Fla.*, 885 So. 2d at 314. The petitioning process is allowable under Florida law. *Id.* at 320 (Anstead, J., dissenting); *see also* FLA. STAT. § 103.021(4)(b) (2004).

146. *Reform Party of Fla.*, 885 So. 2d at 314 (Lewis, J., concurring).

147. *Id.* at 316 (Lewis, J., concurring); *see also* FLA. STAT. § 103.021(4)(a) (2004).

148. *See Reform Party of Fla.*, 885 So. 2d at 319.

149. *Id.* at 305.

150. *See id.* at 316 (Lewis, J., concurring).

I firmly believe that a multi-party system would be beneficial to the health of our democracy in general. Some of the reasons why the health of our democracy can be questioned appeared in an article by Robert A. Pastor who cited the following facts:

Registration and Identification of Voters. The United States registers about 55 percent of its eligible voters, as compared with more than 95 percent in Canada and Mexico. To ensure the accuracy of its list, Mexico conducted 36 audits between 1994 and 2000. In contrast, the United States has thousands of separate lists, many of which are wildly inaccurate. Provisional ballots were needed only because the lists are so bad. Under HAVA, all states by 2006 must create computer-based, interactive statewide lists—a major step forward that will work only if everyone agrees not to move out of state. That is why most democracies, including most of Europe, have nationwide lists and ask voters to identify themselves. Oddly, few U.S. states require proof of *citizenship*—which is, after all, what the election is supposed to be about. If ID cards threaten democracy, why does almost every democracy except us require them, and why are their elections conducted better than ours?¹⁵¹

Curtis Gans of the Center for the Study of the American Electorate has faithfully followed the rise and fall of participation by the American electorate in presidential years over several decades.¹⁵² Other writers on the subject, like Alexander Keyssar in *The Right to Vote: The Contested History of Democracy in the United States*, amply document the fact that despite the 15th, 19th, 23rd, 24th, and 26th Amendments to the United States Constitution, the Voting Rights Act of 1965 and the 1982 amendments thereto, the National Voter Registration Act of 1993 (often referred to as the “motor voter” law), and last but far from least, in terms of its implications for electronic voting, the Help America Vote Act of 2002 (HAVA)¹⁵³ have not improved voter participation.¹⁵⁴ HAVA is the last major federal legislation to deal with the electoral process and was a response to some, but certainly not all, of the

151. Robert A. Pastor, *America Observed: Why Foreign Election Observers Would Rate the United States Near the Bottom*, AM. PROSPECT, Jan. 2005, at A2.

152. COUNCIL FOR EXCELLENCE IN GOVERNMENT, A MATTER OF TRUST: AMERICANS AND THEIR GOVERNMENT: 1958-2004 47 (2004), at <http://www.excelgov.org/usermedia/images/uploads/PDFs/AMOT.pdf> (last visited Mar. 30, 2005) [hereinafter A MATTER OF TRUST].

153. Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (2002) (to be codified at 42 U.S.C. § 15301).

154. See generally ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES (2000).

difficulties that arose in the bitter contest over the results of the 2000 election. It should be noted at this point that Piven and Cloward link a decline in voter participation to one of the several so-called realigning elections in our history.¹⁵⁵ In this case, it was the election of McKinley in 1896 which saw not only the defeat of his Democratic opponent, Williams Jennings Bryan, but the emergence of the structured two-party system that has dominated our presidential elections ever since.¹⁵⁶

The difficulty confronting the Supreme Court of Florida in *Reform Party of Florida* was definitional.¹⁵⁷ What did the Florida Legislature mean by such phrases as “national party” and “national convention?”¹⁵⁸ Justice Lewis, quite properly, did not want to rely on the Federal Election Commission (FEC) (the regulatory body for campaign finance laws affecting presidential campaigns) as the ultimate arbiter of when a party is qualified to put its candidate before the voters.¹⁵⁹ This difficulty was highlighted by Justice Lewis’s comparison of the states of Hawaii and Iowa.¹⁶⁰ In the former, an existing party in one other state entitled a minor party to ballot access in presidential contests.¹⁶¹ However, in Iowa, the party must be recognized as such “in at least twenty-five other states.”¹⁶² Despite Mr. Nader’s success in winning a place on the Florida ballot in 2004, the concurring opinion warned that the imprecise language of the statute should constitute a clear warning to future candidates that they are in danger of being denied the right to make their case to the voters in a run for the presidency.¹⁶³

Florida’s perceived dilemma about candidates wishing to run outside the two-party system is a national problem, not just a state or local problem. Since at least *Anderson v. Celebrezze*,¹⁶⁴ the Court has made it perfectly clear that presidential elections involve a contest for the one office among thousands of elected offices in our democracy, that involve every American voter.¹⁶⁵ The national implications of that simple, yet profound, fact clearly

155. FRANCES FOX PIVEN & RICHARD A. CLOWARD, *WHY AMERICANS STILL DON’T VOTE: AND WHY POLITICIANS WANT IT THAT WAY* 65 (2000).

156. *Id.* at 73.

157. *See generally* *Reform Party of Fla. v. Black*, 885 So. 2d 303 (Fla. 2004).

158. *Id.* at 312.

159. *Id.* at 318 (Lewis, J., concurring).

160. *Id.* at 316 (Lewis, J., concurring).

161. *Id.* at 313.

162. *Reform Party of Fla.*, 885 So. 2d at 313 (citing IOWA CODE ANN. § 68A.102(16) (2003)).

163. *Id.* at 319.

164. 460 U.S. 780 (1983) [hereinafter *Anderson II*]; *see also* *Storer v. Brown*, 415 U.S. 724 (1974); *Williams v. Rhodes*, 393 U.S. 23 (1968).

165. *Anderson II*, 460 U.S. at 795.

call for a federal statute applicable in all fifty states and the District of Columbia. The present state of our federal election law should not stop at assuring the right of individual voters to cast a vote for president only when the candidate is the nominee of one of the major parties.

Efforts to deal with this problem by enacting a federal statute capable of overriding existing state laws, on the subject of ballot access for non-major party candidates, would not suffice. Conceivably, there could be an effort made under HAVA to condition federal grants for improved state electoral systems on the state's adoption of laws that would specifically grant ballot access to non-major party candidates in a non-discriminatory manner. However, that hit or miss strategy is questionable because it does not really confront the problem. The mythology of this extra-constitutional political system must be pierced, not by bribing states to allow a challenger from outside that system, but by permitting truly unbiased freedom and equality in the electoral arena.

Professor Jamin B. Raskin, in *Overruling Democracy: The Supreme Court vs. The American People*, offers this trenchant observation:

the "two-party system" is neither a historical trend nor a constitutionally driven public institution but a kind of vast political anti-trust conspiracy.

. . . [I]t has successfully reshaped the essential features of our electoral institutions, from ballot-access laws to . . . debate-access laws to presidential campaign public financing laws. This "two-party system" exists indeed, and with a vengeance.¹⁶⁶

Surely it is difficult to imagine that when the Framers were arguing in the debates that took place during the period of ratification for the creation of a new democratic republic, they believed it would be based on a framework of a two-party system; or, that it would operate to the exclusion of the possibility that a multiparty system could emerge. It certainly was not consciously barred and excluded from future consideration.¹⁶⁷ It is true that Madison in his *Federalist No. 10* inveighed against factions and the peril they could pose for a nascent Republic.¹⁶⁸ It is also well established that the term faction, as used in that context, could be equated with a political party.¹⁶⁹ However, there is scant evidence that Madison took a binary approach, which excluded

166. JAMIN B. RASKIN, *OVERRULING DEMOCRACY: THE SUPREME COURT VS. THE AMERICAN PEOPLE* 98 (2003).

167. See THE FEDERALIST NO. 10 (James Madison).

168. See *id.*

169. See *id.*

the possibility that no more than two views could be refined to solve future problems that might beset the new democracy with its republican approach to governance.¹⁷⁰

Morris P. Fiorina was cited in this article as deploring the decline of “collective responsibility” in solving our problems as a nation.¹⁷¹ Fiorina alleged that a generation has passed since “parties have provided an ‘adequate’ degree of collective responsibility.”¹⁷² This in turn, he believed, had produced “deleterious consequences.”¹⁷³ He also offered the conclusion that “[s]ince 1965 the parties have done little or nothing to earn the loyalties of modern Americans.”¹⁷⁴ This trenchant observation, I believe, cannot be dismissed a quarter of a century later as a remark out of time and out of place.¹⁷⁵ Two of the consequences of political decline resulting from the deficit in the collective responsibility of our existing duopoly are: “the growing importance of single-issue politics and the growing alienation of the American citizenry.”¹⁷⁶ Another profound result of our bipolar domestic politics is what Fiorina describes as immobilism, which specifically refers to critical problems regarding energy, public debt, and the attendant higher costs they will invoke in the future.¹⁷⁷ How prophetic indeed is his observation long ago that:

political inability to take actions that entail short-run costs ordinarily will result in much higher costs in the long-run [for the American people who] ... will not have an opportunity to choose between two or more such long-term plans. Although both parties promise tough, equitable policies, in the present state of our politics, neither can deliver.¹⁷⁸

These statements may seem morose or Cassandra-like pronouncements from the Academy. However, an array of different sources, including both political scientists and law school academics across America, are writing on

170. *See id.*

171. Fiorina, *supra* note 115, at 26.

172. *Id.* at 27.

173. *Id.* at 28.

174. *Id.* at 33.

175. *See id.* at 26.

176. Fiorina, *supra* note 115, at 39.

177. *Id.*

178. *Id.* at 40.

this subject and asking whether the most recent decade's elections validate Fiorina's need for greater accountability.¹⁷⁹

III. PROBLEMS WITH THE UNITED STATES' BI-PARTISAN ORIENTED BALLOT ACCESS LAWS

In *Williams v. Rhodes*, the United States Supreme Court decided an issue regarding ballot access in an election involving the contest for presidency.¹⁸⁰ *Williams* not only involved the issue of an individual candidate, namely George Wallace, the controversial former Governor of Alabama, but also involved Wallace's newly-formed American Independent Party.¹⁸¹ Although Wallace's petition to secure a place on the Ohio ballot garnered over 450,000 signatures in six months, far more than Ohio required for a new party, he was not given a place on the ballot because he missed the deadline under Ohio law.¹⁸² The parties who received ten percent of the vote cast for the previous gubernatorial election were automatically granted ballot access.¹⁸³ However, the nominees of these parties were not chosen until later at the national general election.¹⁸⁴ Wallace won this lawsuit on the grounds that the Ohio ballot access law violated the Equal Protection Clause of the Constitution by giving preferential treatment to the two major parties: Republican and Democratic.¹⁸⁵ Further, the Court held the associational rights of voters who wished to vote for an Independent candidate were violated under the First Amendment.¹⁸⁶ The Court applied strict scrutiny, which requires the state to show a compelling interest to warrant interference with an individual's right to associate.¹⁸⁷ Ohio had argued that its law should be sustained to further the compromise and stability that inheres in the two-party system.¹⁸⁸

In reply to that argument, the Court reasoned that the Ohio law did not, as applied, simply support a concept or a construct of a two-party system.¹⁸⁹

179. See generally DANIEL HAYS LOWENSTEIN & RICHARD L. HASEN, *ELECTION LAW: CASES AND MATERIALS* (3d ed. 2004).

180. See *Williams v. Rhodes*, 393 U.S. 23 (1968).

181. *Id.* at 26.

182. *Id.* at 26–27. The number of signatures actually exceeded fifteen percent of the ballots cast in the last election for governor, which was required by Ohio law. *Id.* at 27. Three years later, the Court upheld a Georgia statute requiring five percent for independent candidates. See *Jenness v. Fortson*, 403 U.S. 431 (1971).

183. *Williams*, 393 U.S. at 26.

184. See *id.* at 33.

185. *Id.* at 34.

186. See *id.* at 32.

187. *Id.* at 31.

188. *Williams*, 393 U.S. at 32.

189. *Id.*

It was clearly drawn to advantage the political chances of two specific, identifiable parties: Republican and Democratic.¹⁹⁰ The Court went on to challenge Ohio's right, in essence, to create a permanent political monopoly.¹⁹¹ Secondly, the Court reasoned that competitive politics is important because it produces new ideas and different programmatic approaches that all require First Amendment protection.¹⁹² Therefore, it is also important to permit freedom of association to advance those new and different approaches.¹⁹³ Furthermore, if all new parties are destined to be stillborn because they are not granted time to lay a foundation on which to grow through active participation in the electoral process, they would be robbed of the advantages that both existing major parties enjoy.¹⁹⁴

Pausing at this point to reflect on the Florida ballot access statute involved in *Reform Party of Florida*, I question both the practicality and constitutionality of the statutory language.¹⁹⁵ The statute grants ballot access only to the nominee of a "national party" which holds a "national convention."¹⁹⁶ Determining what constitutes a national party should not be a judicial function, even with courts having the benefit of expert testimony from political consultants, political scientists, media consultants, or a wide variety of other talents associated with the giant conglomerates that now make up the national party campaigns for the American presidency.

On the other hand, section 103.021(4)(b) of the *Florida Statutes* clearly involves in-state petitioning by a new party candidate for President of the United States as a qualifying procedure for ballot access.¹⁹⁷ It is foreseeable that this legislation will pass constitutional muster under current precedents, going back to *Williams*, and more specifically, *Jenness v. Fortson*.¹⁹⁸ However, other efforts by state legislatures to regulate political party conventions and standing of putative candidates for the presidency should be regarded as highly suspect. Conventions of the established major parties are not decision-making bodies. They are simply showcases where a party merchandises its wares or, at the very least, attempts to do so.

190. See *id.* In his concurring opinion, Justice Douglas added "Ohio . . . has effectively foreclosed its presidential ballot to all but Republicans and Democrats." *Id.* at 35 (Douglas, J., concurring).

191. *Id.* at 32.

192. *Williams*, 393 U.S. at 32.

193. *Id.*

194. *Id.* at 33.

195. FLA. STAT. § 103.021(4)(a)-(b) (2004).

196. § 103.021(4)(a).

197. § 103.021(4)(b).

198. 403 U.S. 431 (1971) (holding that a state's nominating petition requirement did not violate the First Amendment).

Aside from the officiousness and the emptiness in any meaningful sense of a national convention as a vital cog in the machinery of our democracy, United States Supreme Court cases like *Eu v. San Francisco County Democratic Central Committee*¹⁹⁹ have led me to wonder how hospitable the judicial climate will be to statutorily link the role of national conventions of even major parties directly to the electoral process. Admittedly, *Eu* struck down severe state regulation of party committees' endorsement of political candidates as violating the First and Fourteenth Amendments.²⁰⁰ Nonetheless, the argument that the overarching right of the American people to choose the President should be conditioned on a party convention nomination is simply indefensible. In *Eu*, California argued that strict scrutiny was not required of the statutory regulation, but Justice Marshall rejected that argument.²⁰¹

I next approach the problem raised by the Florida Ballot Access Law from the broader perspective of the states' laws both generally in this article and in more detail in the appendix explaining the ballot laws in all fifty states.²⁰² Richard Winger, founder and long-time editor of Ballot Access News in San Francisco, provides an excellent and highly critical historical review of ballot access laws for all fifty states through 2002.²⁰³ Winger points out that it was only in the late 1930s that what he labels "massive petition requirements" began.²⁰⁴ Then abruptly in 1971 with the Court's decision in *Jenness v. Fortson*, which was only three years after the *Williams* decision discussed above, the Court virtually called a halt to efforts by Independents and minor or third parties to protest the raising of the petition barrier to heights that have made the present duopoly invincible.²⁰⁵

An earlier warning, no less alarming in tone, was published in a lengthy article by Bradley A. Smith, entitled *Judicial Protection of Ballot-Access Rights: Third Parties Need Not Apply*.²⁰⁶ Smith developed a theme similar to Mr. Winger.²⁰⁷ Together these articles represent a body of opinion with which I wish to publicly associate myself. They are germane to the analysis and discussion of the Supreme Court of Florida's decision on the electoral

199. 489 U.S. 214 (1989).

200. *Id.* at 233.

201. *Id.* at 222. But see Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 TEX. L. REV. 1741 (1993).

202. See *infra* Appendix.

203. Richard Winger, *The Supreme Court and the Burial of Ballot Access: A Critical Review of Jenness v. Fortson*, 1 ELECTION L.J. 235 (2002) [hereinafter Winger I].

204. *Id.* at 236.

205. *Id.* at 235.

206. Bradley A. Smith, *Judicial Protection of Ballot-Access Rights: Third Parties Need Not Apply*, 28 HARV. J. ON LEGIS. 167 (1991).

207. See *id.*; Winger I, *supra* note 203.

process. Also, the two articles cited above furnish an opportunity to go beyond analysis of the decisions themselves and to offer some thoughts on possible guidelines on what the future of ballot access laws should be and to venture some additional thoughts on a uniform, truly national approach to how we elect our President in the twenty-first century.²⁰⁸ At the same time we fully recognize that ours is a federal system where states both historically and constitutionally have certain responsibilities about how our elections are conducted.

We must necessarily begin with the recognition of the overwhelming power of the two major parties—the past and present duopoly that has already been referred to. I shall leave much of the history of that development to others. However, I must be forgiven if I note that it is not merely a personal predilection, but well documented by these historians that it is third parties as far back as the early nineteenth century that produced both ideas and action on a variety of fronts—from women's rights, to child labor, to progressive electoral reforms designed to enlarge the role of individual voters and battle against bossism and corruption in the ranks of both capital and labor.²⁰⁹

James B. Weaver received eight percent of the popular vote in 1892 as the candidate of the Populist Party.²¹⁰ Many of the reforms contained in his platform were taken over by the Democratic Party;²¹¹ some by Theodore Roosevelt in his third party run in 1912 as nominee of the Progressive Party, when he garnered twenty-seven percent of the popular vote.²¹² Such developments led to Richard Hofstadters' famous remark in 1912 that third parties "sting like a bee and then die."²¹³

It has been pointed out that it was the spectacular third party run of the Bull Moose candidate, Theodore Roosevelt, which sparked the passage of new or revised ballot access laws precisely designed to block gains by Independent and third party candidates.²¹⁴

As the state laws across the land are examined, it will be noted that many states are not satisfied to impose the barrier to ballot access in terms of

208. Winger I, *supra* note 203.

209. See V.O. KEY, JR., *POLITICS, PARTIES, & PRESSURE GROUPS* 257–58 (5th ed. 1964); STEVEN J. ROSENSTONE ET AL., *THIRD PARTIES IN AMERICA* 8 (2d ed. 1984); Smith, *supra* note 206, at 169.

210. KEY, *supra* note 209, at 257; Smith, *supra* note 206, at 170.

211. KEY, *supra* note 209, at 257–58.

212. *Id.* at 263; see also ROSENSTONE ET AL., *supra* note 209, at 86.

213. Stephen E. Ambrose & Richard D. Lamm, *Why America Needs a New Political Party*, at http://www.americanreform.org/Lamm/new_political_party.html (last visited Mar. 30, 2005).

214. See Smith, *supra* note 206, at 170.

a fixed percentage of the registered voters or the votes cast for governor or state official in a particular prior state election.²¹⁵ They include a wide variety of procedural restrictions on who may circulate petitions and may require certain arcane information from the signer, such as a voter affidavit number.²¹⁶

While all the above is going on, it should be reiterated that major party candidates, however, are totally exempt no matter how obscure their identities may have been in their past life.²¹⁷ If they are clothed in the major party banner they need not spend their time petitioning to be assured that their names have been placed on the ballot.²¹⁸ It is their shield against the demands of time, money, and expenditure of effort to legitimate their placement and right to compete in the public arena of an electoral campaign for public office.²¹⁹

What then are, and should be, the justifications for the tendency of state ballot access laws to be exclusionary and thereby lend official state sanction to the duopoly of political power complained of by Smith, Winger, and the co-author of this article? The most common reasons stated are that this duopolistic system has given us compromise and political stability.²²⁰ Ancillary reasons are that these restrictive laws prevent ballot confusion and assure the orderly administration of the electoral proceed that is necessary if citizens are to be allowed to cast an effective vote.²²¹

In *Munro v. Socialist Workers Party*,²²² the United States Supreme Court considered a ballot access requirement, in a so-called blanket primary for a United States Senate seat, to determine whether a candidate should receive placement on the general election ballot if they do not receive at least one percent of the votes cast for that office in the primary.²²³ Dean Peoples, a candidate of the Socialist Workers Party, was on the primary ballot with thirty-two other candidates from other parties.²²⁴ However, out of 681,690 votes cast, he received only 596 or .00009 percent of total votes.²²⁵ He was denied placement on the ballot.²²⁶ In the suit that followed, the federal court

215. See *id.* at 176–77.

216. *Id.* at 176.

217. *Id.*

218. *Id.*

219. See Smith, *supra* note 206, at 176–77.

220. See *id.* at 179.

221. See *id.* at 180.

222. 479 U.S. 189 (1986).

223. *Id.* at 190–91.

224. *Id.* at 192.

225. *Id.* at 192 n.9.

226. *Id.* at 192.

of appeals ruled in his favor, and in answer to the State of Washington's proffered defense that Mr. People's low vote total showed insufficient community support to suffer his candidacy through a general election, it said: "Washington's political history evidences no voter confusion from ballot overcrowding."²²⁷

In overruling the court of appeals and approving People's exclusion from the ballot, Justice White accepted the truth of that historical fact but nevertheless went on to say: "We have never required a State to make a particularized showing of the existence of voter confusion, ballot overcrowding, or the presence of frivolous candidacies prior to the imposition of reasonable restrictions on ballot access."²²⁸ He went on to state (astonishingly so, in this writer's opinion) that: "[i]n *Jenness v. Fortson*, [for example] we conducted no inquiry into the sufficiency and quantum of the data supporting the reasons for Georgia's 5% petition-signature requirement."²²⁹ In the *Munro* opinion, the Court referred to its previous decision in *Storer* in which a candidate had been barred from a place on the California ballot by a party disaffiliation provision in the state's electoral code, to renounce the idea that empirical evidence was required in cases challenging a state's ballot access laws.²³⁰ Testing the law's constitutionality does not require proof of a compelling state interest.²³¹ It was enough for the state to allege that it was seeking to protect the voters, and it was not necessary to justify the means employed or make any effort beyond the assertion itself that the voters were better off with a more limited choice of candidates.²³² It is noteworthy that Justice Marshall, in a dissent, made this telling rejoinder:

The necessity for [a higher standard of review] becomes evident when we consider that major parties, which by definition are ordinarily in control of legislative institutions, may seek to perpetuate themselves at the expense of developing minor parties. The application of strict scrutiny to ballot access restrictions ensures that measures taken to further a State's interest in keeping frivolous candidates off the ballot do not incidentally impose an impermissible bar to minor-party access.²³³

227. *Munro*, 479 U.S. at 194 (quoting *Socialist Workers Party v. Munro*, 765 F.2d 1417, 1420 (9th Cir. 1985), *rev'd*, 479 U.S. 189 (1986)).

228. *Id.* at 194-95.

229. *Id.* at 195.

230. *Id.*

231. *Id.* at 200-01.

232. *Munro*, 479 U.S. at 194-95.

233. *Id.* at 201 (Marshall, J., dissenting).

In another commentary, Professor Michael J. Klarman points out the other problem with the Court's decision in *Munro* as it relates to ballot access requirements affecting the formation of, and admission to, our political system of independent or minor party candidates.²³⁴ In *Munro*, which involved the exclusion of a minor-party candidate, Justice White dismissively observed that "[i]t can hardly be said that Washington's voters are denied freedom of association because they must channel their expressive activity into a campaign at the primary as opposed to the general election."²³⁵ What Justice White was saying is that for a minor-party candidate, one bite out of the apple should be quite enough to satisfy that party's desire for its voice to be heard.²³⁶ Justice White is implying that regardless of how widely divergent the minor party's message might be, it need not be heard in the general election campaign by the far wider audience of voters who tune in and participate in the decisive contest.²³⁷ This obviously contributes to the entrenchment problem. In other words, one election in the primary phase of our electoral process for minor parties is quite enough.

Another United States Supreme Court case that clearly indicates the trend of the Court's thinking in the area of ballot access is the recent case of *Timmons v. Twin Cities Area New Party*.²³⁸ Today many states ban multi-party or cross-filing for a political office; i.e., they forbid fusion where more than one political party seeks to nominate a candidate for the same office.²³⁹ For example, a Minnesota law banned fusion in 1991.²⁴⁰ In upholding that law, the Court, per Chief Justice Rehnquist, relied on the argument that: "[s]tates certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials."²⁴¹ The majority's opinion expressed extreme concern regarding fusion destroying the unity of political parties, while promoting factionalism within the parties and making the ballot "a billboard for political advertising" instead of achieving what should be its only purpose—to choose candidates.²⁴²

Justice Stevens, joined by Justices Ginsburg and Souter, dissented and stated the majority was wrong in its "conclusion that the ballot serves no

234. Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 522 (1997).

235. *Munro*, 479 U.S. at 199.

236. *See id.*

237. *Id.*

238. 520 U.S. 351 (1997).

239. *Id.* at 355.

240. *Id.*

241. *Id.* at 364.

242. *Id.* at 365.

expressive purpose for the parties who place candidates on the ballot.”²⁴³ Justices Stevens and Ginsburg made an additional important point that “most States have enacted election laws that impose burdens on the *development and growth* of third parties.”²⁴⁴ They went on to add “[t]he fact that the law was both intended to disadvantage minor parties and has had that effect is a matter that should weigh against, rather than in favor of, its constitutionality.”²⁴⁵

It is almost uniformly accepted by political scientists that the two-party system is already aided immeasurably by our single-member system of both congressional and state legislative districting in maintaining its dominant role in our political system, and has for well over a century and a half.²⁴⁶ It is further aided by our system of electing plurality winners in single member districts; i.e., our “first past-the-post” system that has come to be known as Duverger’s law, and so inexorable is the resulting two-party system.²⁴⁷ Therefore, the misbegotten judicial concern for the protection of a two-party system is unwarranted.

Liberalizing access to the ballot for both Independents and third parties for legislative offices still leaves them the enormous difficulties of surmounting that hurdle. For unitary offices such as the President of the United States, or at the state level, that of governor and other state constitutional officers, the first-past-the-post system would have quickly eliminated popular past presidential candidates such as President Theodore Roosevelt in his 1912 third-party new-party bid.²⁴⁸ The major parties are not an endangered species needing government, or for the purposes of the argument being made here, or judicial protection, or the legislative hurdles posed by ballot access laws conjured up in state legislature either by state legislators seeking their own entrenchment or at the behest of party officials.

Richard Pildes, in his article *Democracy and Disorder*,²⁴⁹ has effectively summarized and suggested an answer to the questions posed here, which I believe are incorrect assumptions of the courts in general.²⁵⁰ His assertions are prompted by state legislation targeting the necessity of narrowly limiting

243. *Timmons*, 520 U.S. at 373.

244. *Id.* at 378 (emphasis added).

245. *Id.*

246. See Issacharoff & Pildes, *supra* note 114, at 675 n.121.

247. *Id.* at 675 & n.121 (citations omitted).

248. See Bruce G. Peabody & Scott E. Gant, *The Twice and Future President: Constitutional Interstices and the Twenty-Second Amendment*, 83 MINN. L. REV. 565, 583 (1999).

249. Richard H. Pildes, *Democracy and Disorder*, 68 U. CHI. L. REV. 695 (2001).

250. See generally *id.*

ballot access, as well as the United States Supreme Court's misapplication of concerns linking the maintenance of stability and order in our democracy.²⁵¹

Some would argue that American politics today suffers from a bi-polar disorder because there is polarity manifested by a bi-partisan axis. The degree to which ballot access laws have played some role in maintaining this duopoly is open to debate and discussion. However, I believe this issue cannot be dismissed as insignificant.

Bradley Smith, in a historical view of this question, pointed out that ballot access laws did not really draw attention and undergo extensive revision until Theodore Roosevelt's Progressive Party out-poled his Republican opponent, the incumbent President William Howard Taft, in the 1912 election.²⁵² Although Roosevelt lost the election to Wilson, fourteen Progressive Party members were elected to Congress under his banner.²⁵³ The Australian secret ballot had not begun general adoption in this country until 1888.²⁵⁴ Until then, ballot access was not really a problem because parties prepared their own ballots.²⁵⁵ However, the Socialist Party received its largest percentage, with six percent in the 1912 presidential election.²⁵⁶ As Smith further recounts, the state legislatures then swung into action when Senator Robert LaFollete, "trying to launch a new Progressive Party, faced ballot-access laws that were 'an almost insuperable obstacle to the new party.'"²⁵⁷ Smith reached the conclusion that "[n]evertheless, strict ballot-access restrictions have helped the two major parties to achieve a vise-grip on American politics never before attainable."²⁵⁸ The parties' evolution to the present day has been a long story in and of itself.²⁵⁹ Smith's second chapter began with addressing *Williams v. Rhodes*, which was discussed earlier in this article.²⁶⁰ Since this article has provided a summary of that evolution, we turn to the issue regarding the proper state-level response to the problem confronting the Supreme Court of Florida in *Reform Party of Florida*.

The difficulties facing the Supreme Court of Florida in interpreting the state's ballot access statute for presidential candidates, along with this article's material regarding the different approaches to ballot access in other jurisdictions, might suggest that statutory reform would be prominent in any

251. See *id.* at 714–18.

252. Smith, *supra* note 206, at 170.

253. *Id.*

254. *Id.* at 172.

255. *Id.*

256. *Id.* at 170.

257. Smith, *supra* note 206, at 171.

258. *Id.*

259. *Id.*

260. See discussion *supra* Part III; 393 U.S. 23 (1968).

list of changes to the electoral process concerning the presidential election.²⁶¹ Following the 2000 presidential election, former Presidents Gerald Rudolph Ford and James Earl Carter, along with many other notables, became the appointed co-chairs of the National Commission on Federal Election Reform, and in due course, the Commission produced an impressive 356-page report, which was reassuringly entitled *To Assure Pride and Confidence in the Electoral Process*.²⁶² Sadly, the report does not discuss how to reform the states' ballot-access laws.²⁶³ In enacting the Help America Vote Act, Congress also chose not to broach the subject.²⁶⁴ This article is not intended as a criticism of either the Commission or Congress.

Florida has received the accolade of being listed as one of the "[l]eading major reform states" by Daniel J. Palazzolo and James Ceaser in their recently published book on electoral process reform.²⁶⁵ In that volume, Susan A. MacManus has headed her contribution on Florida as "Nonstop Reform Since Election 2000."²⁶⁶ The most extensive reforms were in the first session of the Florida legislature following the election of 2000, which made Florida the eye of the storm that enveloped the nation in the thirty-five day wait for a final judgment of who had won the presidential election.²⁶⁷ That enormously controversial and still debated discussion has produced a flood of commentary in both books and articles, but it is not the subject of further discussion here save for mentioning its important role in generating enormous attention to the need for electoral reform both at the national and state level.²⁶⁸ In Congress, the controversy produced the HAVA, and in Florida legislation was introduced, and has been acted upon in every ensuing session of the state

261. See also *Reform Party of Fla. v. Black*, 885 So. 2d 303, 312–14 (Fla. 2004).

262. NATIONAL COMMISSION ON FEDERAL ELECTION REFORM, *TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS* 87 (2001), http://www.reformelections.org/data/reports/99_full_report.pdf (last visited Mar. 30, 2005).

263. See generally *id.*

264. See Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (to be codified at 42 U.S.C. § 15301).

265. ELECTION REFORM: POLITICS AND POLICY 35 (Daniel J. Palazzolo & James W. Ceaser eds., 2005).

266. Susan A. MacManus, *Goodbye Chads, Butterfly Ballots, Overvotes, and Recount Ruckuses! Election Reform in Florida, 2000 to 2003*, in ELECTION REFORM, *supra* note 265, at 37.

267. *Id.* at 38. The President was only elected by a United States Supreme Court decision. See *Bush v. Gore*, 531 U.S. 98, 101–03 (2000); *The Presidential Election is Finally Done*, WASH. POST, Dec. 14, 2000, at C15, 2000 WL 29921494.

268. See ELECTION REFORM: POLITICS AND POLICY, *supra* note 265, at 35.

legislature, dealing with changes and reforms in the electoral process.²⁶⁹ However, for the purposes of this article, it should be emphasized that none of the legislation touches on ballot access by independents or third parties.²⁷⁰ Perhaps this is because the 1999 changes in the law on that subject were so recent that it seemed unnecessary. However, more likely it was true that at both the national and state levels, in the rush to reform, the subject of ballot access was simply not on anyone's radar screen as a critical issue. This seems a strange anomaly because it is almost universally accepted that had Ralph Nader, a third party—then the Green Party candidate—not been on the ballot in Florida, Vice President Gore would have received that state's twenty-five electoral votes and won the presidency.²⁷¹ However, across the nation, most states that moved on election reform ignored the subject of ballot access.²⁷²

I believe that against this background of indifference and inaction, the likelihood of action at the state level—although in this article I confine my attention to Florida, because of its principal focus on the aforementioned decision of *Reform Party of Florida v. Black* and the Supreme Court of Florida's interpretation of minor-party ballot access—is only minimal, if not indeed highly unlikely. This is true despite Justice Lewis' concurring opinion in which he almost plaintively decries the deficiencies of section 103.021 of the *Florida Statutes* for failing to define adequately the terms “national party” and “national convention” in order to provide needed judicial guideposts.²⁷³

It is equally unrealistic, in my judgment, to think that Congress would provide a remedy. For as the Court famously declared in its per curiam opinion in *Bush II*, there is no affirmative right of the individual citizen to vote for electors of the President in Florida or any other state.²⁷⁴ That right is the prerogative of state legislatures under Article II, Section 1, Clause 2 of the

269. Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (to be codified at 42 U.S.C. § 15301); see also Katherine Harris, *The Facts on Florida: Elections Systems Ready for November*, WASH. TIMES, Oct. 20, 2004, at A19, 2004 WL 64166414.

270. See Paul Boudreaux, *The Electoral College and Its Meager Federalism*, 88 MARQ. L. REV. 195, 241–42 (2004); Roberta A. Yard, Comment, *American Democracy and Minority Rule: How the United States Can Reform Its Electoral Process to Ensure “One Person, One Vote,”* 42 SANTA CLARA L. REV. 185, 197–98 (2001); Richard A. Posner, *Florida 2000: A Legal and Statistical Analysis of the Election Deadlock and the Ensuing Litigation*, 2000 SUP. CT. REV. 1, 58 (2001).

271. Boudreaux, *supra* note 270, at 241–42; Yard, *supra* note 270, at 197–98.

272. See Richard Winger, *Ballot Access News* (Feb. 1, 2001), at <http://www.ballot-access.org/2001/0201.html> (last visited Mar. 30, 2005).

273. *Reform Party of Fla. v. Black*, 885 So. 2d 303, 316 (Fla. 2004) (Lewis, J., concurring).

274. *Bush v. Gore*, 531 U.S. 98, 104 (2000).

United States Constitution²⁷⁵ Moreover, the Court made it clear more than a century ago in *McPherson v. Blacker* that the right of individuals to choose the electors is a plenary power.²⁷⁶ Therefore, even though a state's constitution has granted the franchise to the people, "[t]he State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors."²⁷⁷ "[T]here is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated."²⁷⁸

In *Bush II*, the Court hearkened back to its decision more than two decades earlier where, in a 5-4 decision on the ballot access law for independent and minor parties of Ohio, they said: "[i]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only officials who represent all the voters in the Nation."²⁷⁹

I believe that a constitutional amendment expunging the language of Article II, Section 2, Clause 2, effectively abolishing the Electoral College, is not the best path to reform the United States Constitution. Nor should state court judges have to grapple with questions of how to define the meaning of a "national party" or a "national convention," when such terms are linked to a statutory scheme for ballot access for a presidential candidate. I empathize with the frustration of the concurring justice in *Reform Party of Florida*.²⁸⁰ I believe such language should be deleted from the statute. Far more importantly though, the energy for reform should be focused on amending the United States Constitution to declare that it is the right of every voter to cast a vote for President of the United States.

There is an overriding foundational principle that supports our democracy. It was enunciated in one of the most famous cases in our constitutional history, *McCulloch v. Maryland*,²⁸¹ in which Chief Justice Marshall stated: "[t]he government of the Union ... is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."²⁸²

275. *Id.*

276. 146 U.S. 1, 35 (1892).

277. *Bush II*, 531 U.S. at 104.

278. *McPherson*, 146 U.S. at 35 (quoting S. REP. NO. 395 (1874)).

279. *Bush II*, 531 U.S. at 112 (Rehnquist, C.J., concurring) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 794-95 (1983)).

280. See *Reform Party of Fla.*, 885 So. 2d at 315-16 (Lewis, J., concurring).

281. 17 U.S. 316 (1819).

282. *Id.* at 404-05.

To preserve the important principle in the words just quoted, I believe we should now—in view of past judicial precedents that have diminished the peoples' right to choose unfettered by an entrenched party system—reassert that right in the United States Constitution with a "Right to Vote" amendment. It would do away with more than three decades of minor parties being kept off of state ballots²⁸³ by what one writer calls "America's Signature Exclusion."²⁸⁴ The leading expert on ballot access in the United States and editor for many years of *The Ballot Access News*, a monthly publication, entitled a recent article devoted to the subject: *The Supreme Court and the Burial of Ballot Access: A Critical Review of Jenness v. Fortson*.²⁸⁵ The article points out that in the last three decades the Supreme Court has cited *Jenness* approvingly in nine opinions.²⁸⁶ Even more dramatic is that, in lower courts, independent and minor parties have lost on constitutional grounds in 126 cases.²⁸⁷ Almost half of the state legislatures have followed suit by enacting stricter ballot access laws.²⁸⁸ The article lays all of this at the door of *Jenness* and suggests the decision has made the states confident that they can successfully bar minority parties and independent candidates.²⁸⁹ Ralph Nader was on forty-three state ballots in 2000.²⁹⁰ In the last presidential election, he succeed in gaining ballot access in only thirty-four states.²⁹¹ In eighteen states, it was the Democratic Party that undertook legal action to keep him off the ballot.²⁹²

The people cannot, in the words of Chief Justice John Marshall, demonstrate that "[t]he government of the Union...is, emphatically, and truly a government of the people"²⁹³ because they are restricted by state legislatures which are, in turn, sustained by the judicial branch.²⁹⁴ The Constitution itself

283. See *Jenness v. Fortson*, 403 U.S. 431 (1971).

284. RASKIN, *supra* note 166, at 91.

285. Winger I, *supra* note 203, at 235.

286. *Id.*

287. *Id.* at 249–52.

288. See *id.* at 246–49.

289. *Id.* at 248.

290. See *Presidential Vote*, BALLOT ACCESS NEWS, Jan. 1, 2001, at <http://web.archive.org/web/20020203231432/http://www.ballot-access.org/2001/0101.html> (last visited Mar. 30, 2005).

291. Richard Winger, *Did the Democrats Err on Nader?*, BALLOT ACCESS NEWS, Jan. 1, 2005, at <http://www.ballot-access.org/2005/0101.html> (last visited Mar. 12, 2005) [hereinafter Winger II].

292. *Id.*

293. *McCulloch v. Maryland*, 17 U.S. 316, 404–05 (1819).

294. See *generally* *Reform Party of Fla. v. Black*, 885 So. 2d 303 (Fla. 2004) (Lewis, J., concurring).

must spell out that great truth in the unmistakable language of the proposed "Right to Vote" amendment.

IV. CONCLUSION

A vehicle does exist for the enactment of the proposed amendment in House of Representatives Joint Resolution 28, which was introduced in the 108th Congress on March 4, 2003 by Congressman Jesse L. Jackson, Jr. of Illinois.²⁹⁵ In addition, in order to prevent courts from making decisions like *Reform Party of Florida*, a proposed constitutional amendment should also include provisions that: (i) guarantee every citizen the right to vote for President (or presidential elector to the extent the electoral college continues to exist); (ii) limit the ability of states and the District of Columbia in regulating presidential elections to issues surrounding placement of the ballot and design of the ballot; (iii) provide for equal technology to be used by the states and the District of Columbia in connection with the casting and counting of votes in presidential elections; and (iv) provide for uniform standards with respect to ballot access for the office of the presidency. In his floor speech, Jackson began with the following statement from *Bush II*: "[t]he individual citizen has no federal constitutional right to vote for electors for the President of the United States."²⁹⁶ Jackson also referenced Alexander Keyssar's magisterial work, *The Right to Vote: The Contested History of Democracy in the United States*.²⁹⁷ Jackson's floor statement bore the title, "Our Voting System Needs a New Constitutional Foundation", and section 1 of his proposed amendment simply stated:

All citizens of the United States who are eighteen years of age or older shall have the right to vote in any public election held in the jurisdiction in which the citizen resides. The right to vote shall not be denied or abridged by the United States, any State, or any other public or private person or entity, except that the United States or any State may establish regulations narrowly tailored to produce efficient and honest elections.²⁹⁸

Other significant provisions deal with the power of Congress to establish "election performance standards at least once every four years," for example, by mandating periodic review on a quadrennial basis.²⁹⁹ Further, sec-

295. H.R.J. Res. 28, 108th Cong. (2003).

296. *Bush v. Gore*, 531 U.S. 98, 104 (2000).

297. KEYSSAR, *supra* note 154.

298. H.R.J. Res. 28.

299. *Id.*

tion 4 provides for mandatory same day voter registration, and a provision that state rules for appointing electors for President and Vice President shall ensure that each Elector votes for the candidates chosen by a majority of the voters.³⁰⁰

The language quoted above makes it clear that strict scrutiny should be applied in ballot access cases and not produce what Professor Lawrence Tribe described in the treatise *American Constitutional Law*: “Jenness, in contrast [to *Williams v. Rhodes*], shunned discussion of the standard of review, contented itself with emphasizing that the laws being reviewed were less suffocating than those in *Williams*, and found the state interests quite sufficient to satisfy whatever standard it did apply.”³⁰¹

Hopefully, what Professor Jamin Raskin has referred to as “America’s Signature Exclusion: How Democracy Is Made Safe for the Two-Party System”³⁰² can be halted, as the United States Supreme Court would not continue to judge state laws on petitioning for ballot access by its current nebulous standard. Additionally, another critic of the trend of United States Supreme Court decisions in this area of the law, access to the ballot, is Professor Richard L. Hasen of Loyola School of Law.³⁰³ He has addressed what he labels as “Protecting the Core of Political Equality”³⁰⁴ in his book entitled *The Supreme Court and Election Law: Judging Equality from Baker v. Carr to Bush v. Gore*.³⁰⁵ He sums up his chapter on the subject named above in these carefully chosen words:

In sum, cases such as *Jenness*, *Munro*, and *Timmons*, may have been wrongly decided. I say “may have been” rather than “were” because we do not have enough evidence of (1) whether the interests put forward in the case to trump the equality right are adequately supported by the evidence; and (2) if so, how the Court should have engaged in the careful balancing of the rights. Without a doubt, there is good cause for concern that these cases were wrongly decided and have had negative effects on the political equality rights of third parties and independent candidates.³⁰⁶

300. *Id.*

301. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1106 (2d ed. 1988).

302. See RASKIN, *supra* note 166, at 91–116.

303. See RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* (2003).

304. *Id.* at 73.

305. *Id.* at 73–100.

306. *Id.* at 99 (footnote omitted).

Here, the author cites to Richard Winger's seminal article, *The Supreme Court and The Burial of Ballot Access: A Critical Review of Jenness v. Fortson*.³⁰⁷ It is clear to me that the aforementioned line of authority would imperil any effort by Congress to enact a national freedom of access to the ballot law. This conclusion is reached based upon the strictures against interfering with state legislatures and circumscribing their power in appointing electors.³⁰⁸ Additionally, the doctrine interposed to limit congressional authority under Section 5 of the Fourteenth Amendment also plays an integral part.³⁰⁹ In *City of Boerne v. Flores*,³¹⁰ the Court threw down the gauntlet to Congress with respect to what would be regarded as "appropriate legislation," by allowing Congress to enforce the substantive guarantees of the Fourteenth Amendment.³¹¹ In deciding that case, the Court first relied on its own previous interpretations of First Amendment rights and struck down a congressional enactment that would have gone beyond the Court's previous interpretation of those rights.³¹² The Court ruled that Congress could not enlarge its powers under the Due Process and Equal Protection Clauses of the Constitution under the guise of implementing the guarantees of the Fourteenth Amendment.³¹³ It would not only exceed Congress's authority, but it would also infringe upon the prerogatives of the states.³¹⁴

Clearly, the road that any constitutional amendment must travel is both rocky and steep. However, as was suggested in the work by Alexander Keyssar, previously cited, *The Right to Vote: The Contested History of Democracy in the United States*, so eloquently stated:

[t]he history of the right to vote is a record of the slow and fitful progress of the project, progress that was hard won and often subject to reverses. The gains so far reached need to be protected, while the vision of a more democratic society can continue to inspire our hopes and our actions.³¹⁵

It is only too clear, I believe, that a congressional statute seeking to establish federal standards for the conduct of elections and the affirmative right

307. Winger I, *supra* note 203.

308. U.S. CONST. art. II, § 1, cl. 2. This section was interpreted to mean plenary in nature. *McPherson v. Blacker*, 146 U.S. 1, 35 (1892).

309. U.S. CONST. amend. XIV, § 5.

310. 521 U.S. 507 (1997).

311. *Id.* at 519, 536.

312. *Id.* at 518–27.

313. *Id.* at 534.

314. *Id.*

315. KEYSSAR, *supra* note 154, at 324.

to vote would be challenged under the doctrine of *City of Boerne v. Flores* as exceeding the authority of Congress under Section 5 of the Fourteenth Amendment.³¹⁶ Indeed the present Court, with its dedication to the principles laid down in *McPherson* and heavy reliance on the per curiam opinion in *Bush II*, would undoubtedly resort to a “one-two punch” if an effort was made to proceed by statute, instead of a constitutional amendment.³¹⁷

316. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

317. *See McPherson*, 146 U.S. at 35; *Bush v. Gore*, 531 U.S. 98, 100 (2000).

APPENDIX: BALLOT ACCESS LAW OF THE FIFTY STATES AND THE DISTRICT OF COLUMBIA

Alabama: Candidates may obtain access to the general election ballot for the offices of President or Vice President of the United States through either political party nomination or petition.³¹⁸ Political parties that receive 20% of the vote at the last general election qualify to have statewide ballot access.³¹⁹ Nomination by petition requires signatures equal or exceeding 3% of electors who cast ballots for the office of Governor in the last general election.³²⁰

Alaska: To have a candidate's name on the general election ballot, the national committees of political parties which are recognized political parties in Alaska select their Presidential and Vice Presidential candidates in a manner prescribed by their party bylaws.³²¹ Any candidate not associated with one of the aforementioned parties shall be established as a limited political party and must gather signatures in the amount of at least 1% of the number of voters who cast ballots for the office of President in the preceding presidential election.³²²

Arizona: Candidates from recognized political parties within Arizona may place their candidates on the primary election ballot.³²³ However, any qualified elector who is not a registered member of a recognized political party may be nominated through the means of a nomination petition.³²⁴ A new political party that wishes to be recognized on the primary and general election ballots must submit a petition with the number of signatures of qualified electors totaling no less than 1 1/3 % of the total votes cast for governor or presidential electors at the last preceding general election.³²⁵

Arkansas: In order to have a political party's Presidential and Vice Presidential candidates printed on the ballot, the party must nominate the candidates via the primary election.³²⁶ New political parties are able to nominate by convention if the presidential election is the first general election after

318. ALA. CODE § 17-19-2(a) (1995).

319. ALA. CODE § 17-16-2 (1995).

320. ALA. CODE § 17-8-2.1(a)(1) (Supp. 2004).

321. ALASKA STAT. § 15.30.020 (Michie 2004).

322. ALASKA STAT. § 15.30.025(a) (Michie 2004).

323. ARIZ. REV. STAT. § 16-301 (1996).

324. ARIZ. REV. STAT. § 16-341(A) (2004).

325. ARIZ. REV. STAT. § 16-801 (2004).

326. ARK. CODE ANN. § 7-8-302(5)(A) (Michie Supp. 2003).

certification as a party by the Secretary of State.³²⁷ Political groups who have failed to obtain 3% of the total votes cast at an election for the office of Governor or nominees for presidential elector wishing to have their nominee placed on the general election ballot may file a petition with the Secretary of State containing a minimum of 1000 signatures of qualified electors of the state.³²⁸

California: If a minor political party wishes to become “qualified,” thereby giving them access to the primary ballot, they are required to gather signatures equaling at least 1% of the entire vote of the state at the last preceding gubernatorial election.³²⁹ A party may also become qualified if the party gathers a number of signatures on a nomination petition equal to or greater than 10% of the entire vote of the state at the last preceding gubernatorial election.³³⁰

Colorado: Any political party may nominate presidential electors by convention.³³¹ Any candidate not wishing to affiliate with one of the major political parties may gain access to the general election ballot, other than by primary or convention, by either paying a filing fee of \$500 or by filing a nominating petition with at least 5000 signatures of eligible electors.³³²

Connecticut: Nominations by minor parties may be made in accordance with the party rules.³³³ A party wishing to nominate by petition must have the petition signed by a number of qualified electors in the state equal to the lesser of 1% of the votes cast in the preceding general election or 7500.³³⁴

Delaware: A political party may be listed on the general election ballot only when, twenty one days prior to the date of the primary election, the party has registered a number of voters equal to at least 5/100 of 1% of the total number of voters registered in Delaware as of December 31 of the immediately preceding year.³³⁵ A primary election shall be held for all political parties unless they opt to nominate their candidates otherwise.³³⁶ The nominations

327. *Id.*

328. See ARK. CODE ANN. §§ 7-7-205, 7-8-302(5)(B) (Michie Supp. 2003).

329. CAL. ELEC. CODE § 5100(b) (West Supp. 2005).

330. CAL. ELEC. CODE § 5100(c) (West 2003).

331. COLO. REV. STAT. § 1-4-302(1) (2004).

332. COLO. REV. STAT. §§ 1-4-303(1), 1-4-802(1)(c)(I) (2004).

333. CONN. GEN. STAT. § 9-451 (West 2002).

334. CONN. GEN. STAT. § 9-453(d)(1)-(2) (West 2002).

335. DEL. CODE ANN. tit. 15, § 3001 (1999).

336. DEL. CODE ANN. tit. 15, § 3181 (1999).

of the candidates for electors of President and Vice President are to be certified to the State Election Commissioner by the presiding officer and secretary of the state convention or committee of each political party eligible to place candidates on the ballot.³³⁷ No candidate may appear on Delaware's general election ballot as an unaffiliated candidate unless they have not been affiliated with any political party for at least three months prior to the filing of a sworn declaration stating such with the State Election Commissioner.³³⁸ Unaffiliated candidates must also have filed a nominating petition signed by at least 1% of the total number of registered voters in the state.³³⁹

Florida: A minor political party that is affiliated with a national political party holding a national convention to nominate candidates for President and Vice President can have the names of its candidates for President and Vice President printed on the general election ballot by filing a certificate with the Department of State that names the candidates and lists the required number of persons to serve as electors.³⁴⁰ A minor political party that is not affiliated with a national party holding a national convention to nominate candidates for President and Vice President can have the names of its candidates for President and Vice President printed on the general election ballot if a petition is signed by 1% of the registered electors of Florida.³⁴¹

Georgia: The two ways in which candidates may qualify for an election are through a nomination in a primary conducted by a political party or by filing a nomination petition as an independent candidate or as a nominee of a political body.³⁴² Nominations of candidates for public office, other than local office, can be made by nomination petitions signed by electors.³⁴³ A nomination petition for a candidate seeking office must be signed by those registered and eligible to vote in the election in which the candidate is seeking to be elected, and those signing must total at least 1% of the total number of registered voters eligible to vote in the last election for the office in which the candidate is running.³⁴⁴

337. DEL. CODE ANN. tit. 15, § 3301(a) (1999).

338. DEL. CODE ANN. tit. 15, § 3002 (1999).

339. *Id.*

340. FLA. STAT. § 103.021(4)(a) (2004).

341. FLA. STAT. § 103.021(4)(b) (2004).

342. GA. CODE ANN. § 21-2-130 (2003).

343. GA. CODE ANN. § 21-2-170(a) (2003).

344. GA. CODE ANN. § 21-2-170(b) (2003).

Hawaii: Candidates of political parties which have been qualified to place candidates on the primary and general election ballots must have the appropriate official from their party file a sworn application with the chief election officer which states, among other things, that the candidates are the duly chosen candidates of both the state and national party.³⁴⁵ For candidates of non-qualified parties or groups, a petition must be filed with the chief election officer that contains the signatures of currently registered voters equaling at least 1% of the votes cast in Hawaii during the last presidential election.³⁴⁶

Idaho: A political party nominee for President can be printed on Idaho ballots only if the Secretary of State, in his or her sole discretion, determined that the nominee's candidacy is generally advocated or recognized in national news media throughout the United States, or if a petition for nomination is filed with the Secretary of State by members of a political party to which the candidate belongs.³⁴⁷ The petition must contain an amount of signatures from qualified electors which equals at least 1% of the number of votes cast in the state for presidential electors at the previous general election in which a President of the United States was elected.³⁴⁸

Illinois: A presidential candidate may have their name printed on the primary ballot of their political party by filing a petition in the State's Board of Elections office which is signed by not less than 3000 or more than 5000 primary electors who are members of the candidate's political party.³⁴⁹ Nomination of independent candidates and candidates of newly formed political parties for offices filled by voters of the state may be made by nomination papers signed by 1% of the number of voters who voted in the immediately preceding statewide general election, or 25,000 qualified voters of the state, whichever is less.³⁵⁰

Indiana: A candidate not wishing to affiliate with a major political party and who wishes to become a candidate of a minor party not qualified to nominate candidates in a primary election or by political party convention, and who wishes to be a candidate for the office of President or Vice President at the general election, must file a written consent to become a candi-

345. HAW. REV. STAT. § 11-113(c)(1)(C) (1993).

346. HAW. REV. STAT. § 11-113(c)(2)(B) (1993).

347. IDAHO CODE § 34-732(1)-(2) (Michie 2001).

348. IDAHO CODE § 34-732(3)(a) (Michie 2001).

349. 10 ILL. COMP. STAT. 5/7-11 (2003).

350. 10 ILL. COMP. STAT. 5/10-2, 10-3 (2003).

date and a petition of nomination with the Election Division.³⁵¹ In order to be placed on the general election ballot, a minor party candidate must obtain signatures of voters equal to 2% of the total votes cast for Secretary of State in the election district the candidate seeks to represent.³⁵²

Iowa: Nominations for candidates for President and Vice President may be made by nomination petitions signed by at least 1500 eligible electors living in at least ten counties in the state.³⁵³ Any convention or caucus of eligible electors representing a political organization which is not a political party may nominate one candidate for each office being voted on during the general election.³⁵⁴ However, in order for a political organization to have a valid nomination for a state-wide elective office, there must be at least 250 eligible electors and at least one eligible elector from each of the twenty five counties in attendance at the convention or caucus where the nomination is made.³⁵⁵

Kansas: In order for a political party to become recognized, the party shall file a petition with the signatures of at least 2% of the total vote cast for all candidates for the office of Governor in the last preceding general election.³⁵⁶ Party nominations for public office candidates can be made only by a delegate, mass convention, primary election, or caucus of qualified voters belonging to one political party with a national or state organization.³⁵⁷ Party nominations for presidential electors can be made only by a delegate, mass convention, or caucus of qualified electors belonging to a political party with a national or state organization.³⁵⁸ Nominations other than party nominations must all be independent nominations.³⁵⁹ Independent nominations for each candidate for any office elected by voters from the entire state can be made by nomination petitions signed by at least 5000 qualified voters.³⁶⁰

Kentucky: Any political organization not constituting a political party whose candidate received 2% of the vote of the state at the last preceding election for presidential electors may nominate, by a convention or primary election corresponding to the party's constitution and bylaws, candidates for

351. IND. CODE §§ 3-8-6-12, 3-8-6-14 (2002).

352. IND. CODE § 3-8-6-3 (2002).

353. IOWA CODE § 45.1(1) (1999).

354. IOWA CODE § 44.1 (1999).

355. *Id.*

356. KAN. STAT. ANN. § 25-302a (Supp. 2003).

357. KAN. STAT. ANN. § 25-301 (2000).

358. *Id.*

359. KAN. STAT. ANN. § 25-303(b) (Supp. 2003).

360. *Id.*

offices to be voted for during any regular election.³⁶¹ A candidate may be nominated by a petition of electors qualified to vote for the candidate for any office to be voted for during a regular election.³⁶² "A petition of nomination for a state officer, or any officer for whom all the electors of the state are entitled to vote," must contain the names of at least 5000 petitioners.³⁶³

Louisiana: Candidates for presidential nominee must qualify in accordance with the procedures established by their political party.³⁶⁴ Before qualifying as a candidate of a political party for presidential nominee, a person must pay a qualifying fee of \$750 and additional fees imposed by state central committees or obtain a nominating petition with handwritten signatures of at least 1000 registered voters affiliated with the political party from each of the state's congressional districts.³⁶⁵

Maine: A political party qualifies to participate in a primary election if the party was listed on the ballot of either of the two preceding general elections and if: 1) the party held municipal caucuses in at least one municipality in each county during the election year in which the designation was listed on the ballot, an interim election year, and the year of the primary election; 2) the political party held a state convention during the election year in which the designation was listed on the ballot and any interim election year; and 3) the party's candidate for Governor or President received at least 5% of the total vote cast in the state for Governor or President in either of the two preceding general elections.³⁶⁶ A party which qualifies to participate in a primary election must hold a state convention in the same election year in order to have its candidates' party name printed on the general election ballot of that year.³⁶⁷ A party must submit nomination petitions for a slate of candidates for the office of presidential elector that are signed by at least 4000 and no more than 6000 voters.³⁶⁸

361. KY. REV. STAT. ANN. § 118.325(1) (Michie 2004); *see also* KY. REV. STAT. ANN. § 118.015 (defining "political party").

362. KY. REV. STAT. ANN. § 118.315(1) (Michie 2004).

363. KY. REV. STAT. ANN. § 118.315(2) (Michie 2004).

364. LA. REV. STAT. ANN. § 18:1280.22 (West Supp. 2005).

365. *Id.*; *see also* LA. REV. STAT. ANN. § 18:464(c) (West Supp. 2005) (imposing additional fees by state central committees).

366. ME. REV. STAT. ANN. tit. 21-A, § 301(1) (West Supp. 2004); *see also* ME. REV. STAT. ANN. tit. 21-A, § 311 (West 1993 & Supp. 2004) (prescribing roles for municipal caucuses).

367. ME. REV. STAT. ANN. tit. 21-A, § 301(2) (West 1993); *see also* ME. REV. STAT. ANN. tit. 21-A, § 321 (West 1993) (prescribing rules for state conventions).

368. ME. REV. STAT. ANN. tit. 21-A, § 354(5) (West 1993).

Maryland: Nominations for public offices that are filled by elections governed by Maryland's election laws must be made by party primary for candidates of major political parties, or by petition for candidates of political parties that do not conduct nominations by primary, and candidates not affiliated with any political party.³⁶⁹ A candidate seeking nomination by petition may not have their name placed on the general election ballot unless they file appropriate board petitions signed by at least 1% of the total number of registered voters who are eligible to vote for the office for which the nomination by petition is sought, and at least 250 registered voters who are eligible to vote for the office.³⁷⁰

Massachusetts: A political party may have its candidates appear on the primary election ballot by: 1) filing nomination papers signed by at least 2500 voters; 2) the state secretary placing candidates on the ballot who have been generally advocated or recognized in the national news media; and 3) the chairperson of each party's state committee designating on written lists the names of its candidates.³⁷¹ Nominations of candidates to the general election ballot for presidential electors may be made by nomination papers with no less than 10,000 voters' signatures.³⁷²

Michigan: A political party must make nominations by means of caucuses or conventions if the party's principal candidate "received less than 5% of the total vote cast for all candidates for the office of [S]ecretary of [S]tate in the last preceding state election, either in the state or in any political subdivision affected."³⁷³ Therefore, the party is not allowed to make its nominations using the direct primary method.³⁷⁴ Political parties may use a qualifying petition to nominate candidates for statewide elective offices as long as the petition is signed by a number of qualified and registered electors equal to at least 1% of the total number of votes cast for all candidates for Governor at the last election in which a Governor was elected.³⁷⁵ A qualifying petition for the office of President must be signed by at least 100 registered electors in each of at least one half of the congressional districts of the state.³⁷⁶

369. MD. CODE ANN., ELEC. LAW § 5-701 (2003).

370. MD. CODE ANN., ELEC. LAW § 5-703(e)(1) (2003).

371. MASS. GEN. LAWS ch. 53, § 70E (1991).

372. MASS. GEN. LAWS ch. 53, § 6 (2004).

373. MICH. COMP. LAWS § 168.532 (1989).

374. *Id.*

375. MICH. COMP. LAWS § 168.590b(2) (2004).

376. MICH. COMP. LAWS § 168.590b(4) (2004).

Minnesota: Candidates for any partisan office who do not seek the nomination of a major political party must be nominated by means of a nominating petition.³⁷⁷ The number of signatures required on a nominating petition must equal 1% of the total number of individuals voting in Minnesota at the last preceding state general election or 2000 signatures, whichever is less.³⁷⁸

Mississippi: A petition requesting that a candidate for an independent or special election be placed on the ballot for an office elected by the state at large must be signed by at least 1000 qualified electors.³⁷⁹ When a political party nominates by national convention, the Secretary of State must certify to the circuit clerks of the several counties the names of all the candidates for President and Vice President of the United States.³⁸⁰

Missouri: Unless otherwise provided for, all candidates for elective office must be nominated at a primary election in accordance with Missouri's election laws.³⁸¹ A group creating a new political party throughout the state must file a petition with the Secretary of State, which contains the signatures of at least 10,000 registered voters of the state.³⁸²

Montana: An individual who wishes to run for President or Vice President as an independent or minor party candidate must file a petition for nomination with the signatures of 5000 electors or signatures of electors equaling 5% or more of the total votes cast for the successful candidate for governor at the last general election, whichever is less.³⁸³

Nebraska: Partisan candidates running for President and Vice President of the United States must be certified by the national nominating convention in order to be listed on the general election ballot.³⁸⁴ Nonpartisan candidates or candidates from newly established political parties running for President and Vice President may obtain a position on the general election ballot by filing a petition signed by at least 2500 registered voters.³⁸⁵

377. MINN. STAT. § 204B.03 (1992).

378. MINN. STAT. § 204B.08 (2005).

379. MISS. CODE ANN. § 23-15-359(1)(a) (1972 & Supp. 2001).

380. MISS. CODE ANN. § 23-15-785(1) (1972 & Supp. 2001).

381. MO. REV. STAT. § 115.339 (2003).

382. MO. REV. STAT. §§ 115.315(2), (5) (2003).

383. MONT. CODE ANN. § 13-10-504 (2003).

384. NEB. REV. STAT. § 32-620 (1998).

385. *Id.*

Nevada: Candidates of a minor political party running for a partisan office must not appear on the ballot for a primary election.³⁸⁶ Instead, those candidates' names will be placed on the general election ballot if: 1) at the last preceding general election, the minor party received for any of its candidates for partisan office at least 1% of the total number of votes cast for the offices of Representative in Congress; 2) on January 1 preceding a primary election, the minor party has been designated as the political party on the voters' registration applications of at least 1% of the total number of registered voters in Nevada; or 3) no later than the second Friday in August preceding the general election, the minor party files a petition with the Secretary of State which is signed by registered voters equaling at least 1% of the total number of votes cast at the last preceding general election for the offices of Representative in Congress.³⁸⁷

New Hampshire: A candidate may have their name placed on the ballot for the state general election by submitting the requisite number of nomination papers instead of obtaining a nomination through party primary.³⁸⁸ The nomination papers must have the names of 3000 registered voters, 1500 of which must be from each United States congressional district in the state, in order to nominate a candidate for President or Vice President of the United States.³⁸⁹ Each candidate for President who seeks nomination by nomination papers must pay to the Secretary of State a single fee of \$250 for both the presidential and vice-presidential candidates at the time of filing declarations of intent.³⁹⁰

New Jersey: Candidates, except electors of President and Vice President of the United States nominated by political parties at state conventions, must be nominated directly by petition or at the primary for the general election.³⁹¹ A party may nominate by petition its candidate for President and Vice President by filing a petition with at least 800 voters' signatures in the aggregate for each candidate nominated.³⁹²

New Mexico: If the rules of a minor political party require nomination by political convention or by a method other than a political convention, the

386. NEV. REV. STAT. 293.1715(1) (2003).

387. NEV. REV. STAT. 293.1715(2) (2003).

388. N.H. REV. STAT. ANN. § 655:40-b (1996 & Supp. 2003).

389. N.H. REV. STAT. ANN. § 655:42(I) (1996 & Supp. 2003).

390. N.H. REV. STAT. ANN. § 655:19-a (1996).

391. N.J. STAT. ANN. § 19:13-1 (West 1999).

392. N.J. STAT. ANN. § 19:13-5 (West 1999).

names certified to the Secretary of State must be filed and accompanied by a petition containing a list of signatures and addresses of voters totaling at least 1% of the total number of votes cast at the last preceding general election for the President of the United States.³⁹³

New York: Petitions for any office to be filled by the voters of the entire State of New York must be signed by at least 15,000 or 5%, whichever is less, of the then active enrolled voters of the party in the state.³⁹⁴ Not less than 100 or 5%, whichever is less, of those enrolled voters must reside in each of one half of the congressional districts of the state.³⁹⁵ If there are more candidates designated for nomination by a party for an office to be filled by the voters of the entire state than there are vacancies, the nomination(s) of the party must be made at the primary election at which other candidates for public office are nominated and the candidate(s) receiving the most votes will become the nominees of the party.³⁹⁶

North Carolina: Any person seeking endorsement by the national political party for the office of President can file petitions with the State Board of Elections that are signed by 10,000 persons who are registered and qualified voters in North Carolina and are affiliated with the same political party as the candidate for whom the petitions are filed.³⁹⁷

North Dakota: The names of all candidates of each political party or principle or no-party designation, who are shown to have been nominated for the several offices in accordance with the certificates of nomination filed in the Secretary of State's office, must be placed by the secretary of state on the official ballot to be voted for at the next general election.³⁹⁸ Candidates can be nominated by petition; however, each certificate of nomination by petition must meet the specifications set forth in section 16.1-11-16.³⁹⁹ If the nomination is for the office of President of the United States, there must be at least 4000 signatures on the petition.⁴⁰⁰

393. N.M. STAT. ANN. §§ 1-8-2(A)-(B), 1-8-3(C) (Michie 1978 & Supp. 2001).

394. N.Y. ELEC. LAW § 6-136(1) (McKinney 1998).

395. *Id.*

396. N.Y. ELECTION LAW § 6-160(1) (McKinney 1998).

397. N.C. GEN. STAT. § 163-213.5 (2003).

398. N.D. CENT. CODE § 16.1-13-04 (2004).

399. N.D. CENT. CODE §§ 16.1-11-16, 16.1-12-02 (2004).

400. N.D. CENT. CODE § 16.1-12-02 (2004).

Ohio: One way in which candidates for the offices of President and Vice President may have their names printed on the presidential ballot is by having certified to the Secretary of State for placement on the presidential ballot by authorized officials of an intermediate or minor political party that has held a state or national convention for the purpose of choosing those candidates or simply certified those candidates in accordance with the procedures authorized by its party rules.⁴⁰¹ If the candidacy is to be voted on by electors throughout the entire state, the nominating petition must be signed by no less than 5000 qualified electors, yet contain no more than 15,000 signatures.⁴⁰²

Oklahoma: The names of candidates for the office of Presidential Elector pledged to the nominee of a political party not recognized under the laws of Oklahoma for President of the United States can only be printed on the ballot by submitting petitions signed by a number of registered voters supporting the candidacy of the nominee equal to at least 3% of the total votes cast in the last general election for President and by filing those petitions with the Secretary of the State Election Board.⁴⁰³

Oregon: A minor political party can nominate candidates for public office only if it follows procedures set forth in its organizational documents.⁴⁰⁴ A nomination certificate made by individual electors must contain signatures of electors in the electoral district equal to at least 1% of the total votes cast in the electoral district for which the nomination is intended to be made, for all candidates for presidential electors at the last general election.⁴⁰⁵

Pennsylvania: Where the nomination is for any office to be filled by the electors of the state at large, the number of qualified electors signing the nomination papers must be at least equal to 2% of the largest entire vote cast for any elected candidate in the state at large at the last preceding election for which state-wide candidates were voted.⁴⁰⁶

Rhode Island: Every even year, a state convention for each political party must be held no later than October 14 of that year.⁴⁰⁷ In presidential election years, these conventions must select the party nominees for presidential elec-

401. OHIO REV. CODE ANN. § 3505.10(B)(3) (Anderson Supp. 2003).

402. OHIO REV. CODE ANN. § 3513.257(A) (Anderson Supp. 2003).

403. OKLA. STAT. tit. 26, § 10-101.2 (1997).

404. OR. REV. STAT. § 248.009(1) (2003).

405. OR. REV. STAT. § 249.740(1) (2003).

406. PA. STAT. ANN. tit. 25, § 2911(b) (West 1994).

407. R.I. GEN. LAWS § 17-12-13 (2003).

tors and their names will be placed on the ballot for the upcoming election.⁴⁰⁸ At the state convention, parties are to adopt a platform and handle any other business that may properly come before the convention.⁴⁰⁹ The nomination papers of a candidate for the party nomination or an independent candidate for presidential elector must be signed, in the aggregate, by no less than 1000 voters.⁴¹⁰

South Carolina: Nominations for candidates for the offices to be voted on in a general or special election may be conducted by political party primary, political party convention, or petition.⁴¹¹ A candidate's nominating petition must contain the signatures of at least 5% of the qualified registered electors of the geographical area of the office for which the candidate runs, as long as no petition candidate is required to furnish the signatures of more than 10,000 qualified registered electors for any office.⁴¹²

South Dakota: Any candidate for President or Vice President who is not nominated by a primary election may be nominated by filing a certificate of nomination with the Secretary of State.⁴¹³ The number of signatures required must equal to at least 1% of the total combined vote cast for Governor at the last certified gubernatorial election.⁴¹⁴

Tennessee: Political parties may nominate their candidates for any office, other than the offices of Governor, United States Senator, members of the United States House of Representatives, and members of the Tennessee General Assembly, by primary election or any method authorized under the rules of the party.⁴¹⁵ Persons nominated other than by the primary election method for offices filled by voters of more than one county or for statewide offices must be immediately certified to the coordinator of elections by the chair of the nominating body.⁴¹⁶ The coordinator of elections must then certify those nominees to the county election commissions in each county in which the nominees are candidates by the qualifying deadlines.⁴¹⁷ Nominating petitions must be signed by the candidate and twenty-five or more registered

408. *Id.*

409. *Id.*

410. R.I. GEN. LAWS § 17-14-7 (2003).

411. S.C. CODE ANN. § 7-11-10 (Law. Co-op. 1976 & Supp. 2004).

412. S.C. CODE ANN. § 7-11-70 (Law. Co-op. 1976 & Supp. 2004).

413. S.D. CODIFIED LAWS § 12-7-7 (Michie 2004).

414. *Id.*

415. TENN. CODE ANN. § 2-13-203(a) (2003).

416. TENN. CODE ANN. § 2-13-203(c) (2003).

417. *Id.*

voters who are eligible to vote for the office for which the candidate is running.⁴¹⁸ Nominating petitions for independent presidential candidates must be signed by the candidate and twenty-five or more registered voters for each elector.⁴¹⁹ Each independent candidate must note the full number of electors allocated to the state.⁴²⁰

Texas: In order to have the names of its nominees placed on the general election ballot, a political party required to make nominations by convention must file with the Secretary of State lists of precinct convention participants which must equal at least 1% of the total number of votes received by all candidates for governor in the most recent general election.⁴²¹ To be entitled to have its nominees for President and Vice President placed on the general election ballot, a political party must hold a presidential primary election in Texas if: 1) in the presidential election year, the party is required by Texas law to nominate its candidates for state and county offices by primary election; 2) a presidential primary election is authorized under the national party rules; and 3) before January 1 of the presidential election year, the national party has deemed that it will hold a national presidential nominating convention during the presidential election year.⁴²² To qualify for a position on the general election ballot, an independent candidate running for President must apply for a position on the ballot and submit a petition with signatures equaling at least 1% of the total vote received in the state by all candidates for President in the most recent presidential general election.⁴²³

Utah: Registered political parties and candidates for President who are affiliated with a registered political party are able to participate in the Western States Presidential Primary.⁴²⁴ When the nomination is for an office to be filled by the voters of the entire state, the candidate must submit the nomination petition to the county clerk for certification when the petition has been completed by at least 1000 registered voters living in the state.⁴²⁵

Vermont: A minor political party may have its candidate's name printed on the general election ballot for any office for which major political parties

418. TENN. CODE ANN. § 2-5-101(4)(b)(1) (2003 & Supp. 2004).

419. *Id.*

420. *Id.*

421. TEX. ELEC. CODE ANN. § 181.005(a) (Vernon 2003).

422. TEX. ELEC. CODE ANN. § 191.001 (Vernon 2003).

423. TEX. ELEC. CODE ANN. §§ 192.032(a), (d) (Vernon 2003).

424. UTAH CODE ANN. § 20A-9-802(2) (1953 & Supp. 2003).

425. UTAH CODE ANN. § 20A-9-502(2)(a)(i) (1953 & Supp. 2003).

nominate candidates by primary or for the offices of President and Vice President of the United States.⁴²⁶ To constitute a valid nomination for Presidential and Vice Presidential offices, a statement of nomination must contain the signatures of at least 1000 voters qualified to vote in an election.⁴²⁷

Virginia: A group of qualified voters, not constituting a political party under Virginia election law, may have the names of electors selected by the group printed on the official ballot for the election of electors for President and Vice President by filing a petition with the State Board that is signed by at least 10,000 qualified voters and at least 400 qualified voters from each congressional district.⁴²⁸

Washington: A minor political party may hold more than one convention but may not nominate more than one candidate for any one partisan public office or position.⁴²⁹ For the purpose of nominating candidates for the offices of President and Vice President, a minor political party or independent candidate holding multiple conventions may add together the number of signatures supporting the candidate from each convention in order to obtain the number required by section 29A.20.141.⁴³⁰ In order to nominate candidates for the offices of President and Vice President, a nominating convention must obtain and submit to the filing officer the signatures of at least 1000 registered voters from the state.⁴³¹

West Virginia: Any political party which polled less than 10% of the total vote cast only for Governor at the immediately preceding general election may nominate candidates by party conventions, as long as the nominations are made and the certificates filed within the time and manner proscribed by section 3-5-23 or section 3-5-24.⁴³² Groups of citizens not nominating by primary or convention may nominate by petition, and the number of signatures must equal at least 2% of the entire vote cast at the last preceding general election for any statewide, congressional, or presidential candidate, but in no event may the number be less than twenty-five.⁴³³

426. VT. STAT. ANN. tit. 17, § 2381(a)(2) (2002).

427. VT. STAT. ANN. tit. 17, § 2402(b)(1) (2002).

428. VA. CODE ANN. § 24.2-543 (Michie 1950 & Supp. 2003); *see also* VA. CODE ANN. § 24.2-101 (Michie 1950 & Supp. 2003) (defining "political party").

429. WASH. REV. CODE § 29A.20.121(4) (Supp. 2005).

430. *Id.*

431. WASH. REV. CODE ANN. § 29A.20.141(2) (Supp. 2005).

432. W. VA. CODE § 3-5-22 (2002); *see also* W. VA. CODE ANN. §§ 3-5-23, 24 (2002).

433. W. VA. CODE § 3-5-23(c) (2002).

Wisconsin: In the case of candidates for the offices of President and Vice President, the nomination papers must contain both candidates' names, the office for which each candidate is nominated, each candidate's residence and post-office address, and the party or principles they represent in five words or less.⁴³⁴ The number of required signatures on nomination papers for independent candidates running for statewide offices must equal at least 2000 but no more than 4000 electors' signatures.⁴³⁵ For independent presidential electors intending to vote for the same candidates for President and Vice President, the number of required signatures must equal at least 2000 but no more than 4000 electors' signatures.⁴³⁶

Wyoming: The only method in which minor political parties may nominate candidates to be placed on the general election ballot is by party convention.⁴³⁷ A minor political party may never nominate by the primary election process.⁴³⁸ A petition must be signed by those registered electors in the legislative district or other political subdivision in which the petitioner will be a candidate who are able to vote for the candidate.⁴³⁹ The petition must include signatures equaling at least 2% of the total number of votes cast for representative in Congress in the last general election for the political subdivision or legislative district for which the petition is filed.⁴⁴⁰

District of Columbia: A political party which does not qualify under subsection (d) of this section, 1-1001.08, may have its candidates for President and Vice President printed on the general election ballot, so long as a petition nominating the candidates for presidential electors is signed by at least 1% of registered qualified electors of the District of Columbia as of July 1 of the year in which the election is to be and is presented to the Board on or before the third Tuesday in August preceding the day of the presidential election.⁴⁴¹

434. WIS. STAT. § 8.20(2)(c) (2004).

435. WIS. STAT. §§ 8.15(6), 8.20(4) (2004).

436. WIS. STAT. § 8.20(4) (2004).

437. WYO. STAT. ANN. § 22-4-303 (Michie 2003).

438. *Id.*

439. WYO. STAT. ANN. § 22-5-304 (Michie 2003).

440. *Id.*

441. D.C. CODE ANN. § 1-1001.08(f) (2001); *see also* D.C. CODE ANN. § 1-1001.08(d) (2001).

ALTERNATIVE EDUCATION PROGRAMS: A RETURN TO “SEPARATE BUT EQUAL?”

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I. INTRODUCTION

In *Brown v. Board of Education*,¹ the United States Supreme Court announced that “in the field of public education the doctrine of ‘separate but equal’ has no place.”² While some perceive alternative education programs (“AEPs”) as the last hope for “at risk” students, others contend that such programs merely function as “dumping grounds” reserved for disruptive, underprivileged, minority students. Reflecting on the *Brown* decision, school officials should not only recognize the legal exposure arising from poorly-administered exclusionary programs that have the effect of creating

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1. 347 U.S. 483 (1954).

2. *Id.* at 495.

an underclass, but such officials should also evaluate their compliance with the moral imperative that the *Brown* Court articulated some fifty years ago.

Part II of this article examines the various forces driving the development and implementation of AEPs in our public school districts. Part III then describes the form and function of the typical AEP. This part discusses common transfer schemes and also provides a snapshot of AEP student enrollment around the nation. Part IV considers various legal issues arising from the implementation of AEPs in our school districts. This part offers the reader an array of case law dealing with one's rights to an education, and also outlines prospective legal challenges that may emerge with the growth of AEPs. Finally, Part V examines the overall justification of AEPs against the backdrop of the *Brown* decision. This section identifies components that comprise an educational program that is both legally and educationally legitimate under *Brown*, and also considers alternatives to AEPs that might more closely approximate the vision of the *Brown* Court.

II. THE DEVELOPMENT OF ALTERNATIVE EDUCATION PROGRAMS

The creation and development of AEPs across the country can be attributed to a number of external and internal motivating forces. Outside our school systems, the media has aided the development of AEPs by depicting our public schools as madhouses of chaos and violence. Political external forces have also contributed to the development of AEPs by the advancement of legislation and funding schemes which require schools to take stern disciplinary measures against students who are characterized as violent and disruptive. Inside our school systems, administrators, teachers, and parents have also encouraged the development of AEPs. Although their motivations may be as numerous as they are diverse, these groups purport that AEPs not only better serve the needs of disruptive students, but they also advance the interests of traditional school teachers who want to teach, and traditional school children who want to learn.

A. *External Forces*

Scholars have long recognized that fear of school violence has played a prominent role in the proliferation of AEPs across the country.³ It is gener-

3. See Jonathan Wren, "Alternative Schools for Disruptive Youths"—A Cure for What Ails School Districts Plagued by Violence?, 2 VA. J. SOC. POL'Y & L. 307, 309–10 (1995); Augustina H. Reyes, *Alternative Education: The Criminalization of Student Behavior*, 29 FORDHAM URB. L.J. 539, 543 (2001); Eric Blumenson & Eva S. Nilsen, *How to Construct an*

ally accepted that public schools are no longer considered places of safety and stability.⁴ Doubtlessly, this bleak outlook has been shaped by the media's fixation on the apparently omnipresent specter of violence and chaos in our schools.

The media portrays public school classrooms as noisy and chaotic places in which students and teachers are subject to a culture of intense fear and intimidation.⁵ According to some journalists, teachers are not even remotely interested in the welfare of their students, and chaos reigns supreme in their classrooms.⁶ The *New York Times* recently reported that Mayor Michael Bloomberg planned to dispatch a task force of 150 police officers to 12 of New York City's most violent high schools and middle schools to curb violence.⁷ Joining suit, the *Boston Herald* also recently informed its readers that the number of students implicated in school weapons or assault crimes has soared exponentially in Massachusetts from 2000 through 2003.⁸ Beyond its exposure of the egregious levels of violence present in school halls across America, the media has also suggested that school authorities routinely underreport violent incidents that occur on school grounds.⁹

Statistical findings lend support to the media's depiction of pervasive violence in our schools. In recent years, the United States Department of Justice reported that an estimated nine percent of students have experienced one or more violent crimes while attending school.¹⁰ More chillingly, the National Education Association recently found that 100,000 students across the country bring guns to school every day and another 2000 students are attacked each hour of the school day.¹¹

The general public has heard the media's repeated messages of school violence loud and clear—and that message has also reached the ears of the

Underclass, or How the War on Drugs Became a War on Education, 6 J. GENDER RACE & JUST. 61 (2002).

4. Wren, *supra* note 3, at 309–10.

5. Bob Herbert, *Failing Teachers*, N.Y. TIMES, Oct. 24, 2003, at A23, 2003 WLNR 5654908.

6. See *id.*

7. Elissa Gootman, *Police to Guard 12 City Schools Cited as Violent*, N.Y. TIMES, Jan. 6, 2004, at A1, 2004 WLNR 5598486.

8. Kevin Rothstein, *Ed Records: School Weapons, Assault Crimes On the Rise*, BOSTON HERALD, Aug. 9, 2003, at 10, 2003 WLNR 647920.

9. Sam Dillon, *School Violence Data Under a Cloud in Houston*, N.Y. TIMES, Nov. 7, 2003, at A1, 2003 WLNR 5683140. The *New York Times* recently reported that the Houston Independent School District reported 761 assaults in its annual disciplinary summaries sent to Austin whereas its own police, who patrol the schools, reported 3,091 assaults during the same time period. *Id.*

10. Wren, *supra* note 3, at 310.

11. *Id.*

country's judiciary. Indeed, courts have explicitly acknowledged the depiction of chaos in our schools. As the Fifth Circuit Court of Appeals recently noted, "[t]oday it is generally recognized that students are being deprived of their education by lack of discipline in the schools. Not only does disorder interfere with learning school studies, it also defeats the charge to 'inculcate the habits and manners of civility.'"¹²

Political and economic forces have also aided the proliferation of AEPs across the country. To combat school violence, politicians who have adopted a "tough on crime" political posture have sought to bar violent students from schools altogether.¹³ Perhaps the most well known legislation resulting from that camp's activist position is the Gun-Free Schools Act of 1994.¹⁴ Under the Act, the United States Department of Education may cease funding to states that do not adopt a policy requiring one-year expulsions of students caught with guns at schools.¹⁵

Such politicians have found great appeal in AEPs, and for good reason. "Tough on crime" political figures that wish to avoid attacks from critics of zero tolerance exclusionary measures have found a comfortable middle ground in supporting the advancement of AEPs.¹⁶ Lending their support to AEPs, these figures are seen as responding to those constituencies who are calling for an end to school chaos while avoiding critics' claims that traditional exclusionary tactics are short-sighted and irresponsible.¹⁷

There are also economic factors that compel the development of AEPs. As explained more thoroughly below, most AEPs serve students who are considered "at risk" of dropping out of school. Roughly one million students drop out of school each year.¹⁸ "Dropping out of high school . . . is associated with a greater need for such expensive social services as public assistance and unemployment assistance."¹⁹ These societal costs grow exponen-

12. *Nevares v. San Marcos Consol. Indep. Sch. Dist.*, 111 F.3d 25, 26–27 (5th Cir. 1997) (citation omitted).

13. Wren, *supra* note 3, at 312–13.

14. 20 U.S.C. § 8921 (1994) (repealed 2002, current version at 20 U.S.C.A. § 7151 (West Supp. 2003)); Wren, *supra* note 3, at 313.

15. Roni R. Reed, *Education and the State Constitutions: Alternatives for Suspended and Expelled Students*, 81 CORNELL L. REV. 582, 604–05 (1996); Rene Sanchez, *Expulsions Becoming Popular Weapon in U.S. Schools*, WASH. POST, Jan. 20, 1995, at A1, 1995 WL 2074258; Kenneth J. Cooper, *President Directs Schools to Bar Students with Guns; Law Threatens Elimination of Federal Funds*, WASH. POST, Oct. 23, 1994, at A8, 1994 WL 2447095.

16. Wren, *supra* note 3, at 347–48.

17. *Id.*

18. Reed, *supra* note 15, at 605.

19. *Id.* at 606.

tially when taking into consideration the foregone income of dropouts.²⁰ One study estimated that “the foregone income of dropouts from the class of 1981 amounted to \$228 billion and that the foregone government revenues totalled [sic] \$68 billion.”²¹ Indeed, it has been estimated that “for every dollar spent on ‘early intervention and prevention . . . \$4.74 [can be saved] in costs of remedial education, welfare, and crime.’”²²

B. *Internal Forces*

AEPs have also been promoted by groups of teachers and school-site administrators. Teachers have protested that they spend the majority of their time on small groups of students who are “conduct-disordered.”²³ Such teachers apparently maintain that excluding disruptive students from the traditional classroom will allow them to adequately teach the remainder of students in their classrooms who are willing to learn and cooperate.²⁴ It has also been reported that teachers who are outright “unable to deal with disruptive students” have also encouraged the development of AEPs, because the programs themselves allow those teachers to avoid behaviorally troubled students altogether.²⁵

School administrators also find AEPs appealing, if not solely for reasons related to school finance.²⁶ Depending on the time of year that a student is expelled, a school may sacrifice the financing that such a student would generate if the school could report the student as enrolled.²⁷ If the school district offered an AEP, the amount of funding an excluded student generated at the transferor school may still be available to that school even after the student is transferred to the AEP.²⁸ Further, removing potentially low-performing students from campus presents an opportunity for administrators to boost their school’s performance ratings, which, in turn, could lead to cash rewards for administrators in certain school systems.²⁹

20. *Id.*

21. *Id.*

22. *Id.*

23. Wren, *supra* note 3, at 346.

24. *See id.* at 346–47.

25. *Id.* at 346.

26. *See id.*

27. *See* Dillon, *supra* note 9.

28. *See* Reyes, *supra* note 3, at 548.

29. *Id.* at 546.

C. *The Debate: Proponents and Opponents*

Proponents of AEPs point to several additional reasons to advance such programs. First, they maintain that AEPs increase a student's belief in his or her academic ability while decreasing their disruptive behavior.³⁰ Such advocates suggest that unruly students will perform better in alternative schools because they offer individualized curricula and because the students are given the opportunity to be among similarly-situated youth, encouraging them "to reflect upon their lives and consider their actions, resulting in heightened self-esteem and eventually better performance."³¹

Some supporters suggest that AEPs present a "less harmful way" of reducing the tension between the state's interest in maintaining discipline and the student's interest in receiving an adequate public education.³² Furthermore, AEPs are seen as the most reasonable solution to disruptive behavior because they "save" disruptive minority students from being condemned to a life without education by total exclusion.³³ These advocates tout alternative education as a form of education intervention that "would break the cycle of violence that drives these youth, before they commit criminal acts."³⁴ Moreover, this camp maintains that failing to offer such programs actually contributes to problems of drug abuse, crime, and increased utilization of public assistance.³⁵

Critics view AEPs as "dumping grounds" reserved for problematic and mostly minority students.³⁶ Many contend that "alternative schools are nothing more than a convenient place to warehouse students the conventional system is unprepared to handle."³⁷ Instead of helping these troubled students, the traditional schools simply abandon them by placing these students in exclusionary programs that offer virtually no academic content.³⁸

Opponents making such charges point to programs like those administered under Texas law, where "disciplinary" AEPs are administered by county juvenile board officials who lack the instructional expertise to run a successful academic program.³⁹ The critics' fears are well taken, considering

30. Reed, *supra* note 15, at 587.

31. Wren, *supra* note 3, at 347.

32. *Id.* at 341.

33. Reed, *supra* note 15, at 609.

34. Wren, *supra* note 3, at 347.

35. See Reed, *supra* note 15, at 609.

36. Wren, *supra* note 3, at 349.

37. *Id.*

38. *Id.*

39. See Steve Bickerstaff et al., *Preserving the Opportunity for Education: Texas' Alternative Education Programs for Disruptive Youth*, 26 J.L. & EDUC. 1, 18-19 (1997).

that under Texas law, although the academic mission of “Juvenile Justice Alternative Education Programs” is to enable students to perform at grade level, the programs are not required to provide courses necessary to fulfill a student’s high school graduation requirements.⁴⁰

Beyond the central criticism that AEPs offer virtually no academic content, the programs have been attacked for their punitive methodologies. Experts in the field of alternative education have stated that alternative schools “are like soft jails, and that is not the most productive way to deal with human beings. It’s a way of draining off the problem from the system rather than changing the . . . system.”⁴¹ That camp contends that although AEPs may have been originally created to meet the needs of students that were not being met by traditional schools, the programs “have started to look less like educational alternatives for students and more like discipline alternatives for schools. A student now attends an alternative school because she is ‘bad,’ not because the new school will provide her with an educational alternative.”⁴² Such schools tend to “look less like schools and more like juvenile detention centers.”⁴³ Opponents argue that prison-like schools “blur the line between education and punishment for students”⁴⁴ to the extent that some accuse our traditional schools of the “criminalization” of low student achievement.⁴⁵

Even worse, school officials have been accused of using the threat of AEP placement to coerce students who perform inadequately or who engage in inappropriate behavior to “straighten up.”⁴⁶ That threat can be particularly ominous, considering the fact that students in some alternative schools are subject to levels of violence which are dramatically higher than those found in traditional schools.⁴⁷ For example, alternative schools in one of Florida’s largest school districts routinely report “ten times more violent offenses—including assault, battery, robbery, and weapons possession—per person than do their conventional counterparts.”⁴⁸

Finally, critics of AEPs find that they present a new form of segregation, generally separating Latinos and African Americans from the rest of the

40. *Id.* at 18 & n.92.

41. Wren, *supra* note 3, at 349–50 (quoting Jessica Portner, *A New Breed of School for Troubled Youths*, 13 EDUC. WEEK, June 8, 1994, at 30).

42. Jessica Falk, *Overcoming a Lawyer’s Dogma: Examining Due Process for the “Disruptive Student,”* 36 U. MICH. J.L. REFORM 457, 469 (2003).

43. *Id.* at 470.

44. *Id.*

45. See Reyes, *supra* note 3, at 540, 555–56.

46. Falk, *supra* note 42, at 469–70.

47. Wren, *supra* note 3, at 351.

48. *Id.*

student population.⁴⁹ Indeed, some opponents maintain that alternative schools are paramount to segregated schools.⁵⁰ Disparate enrollment trends among poor and minority groups in exclusionary programs throughout the country help to substantiate these claims.⁵¹

While Blacks comprise 21.4% of the students enrolled in public schools across America, they comprise 38% of those suspended on an annual basis.⁵² “Black high school students are suspended from school at a rate of three times that of white students.”⁵³ Courts that have observed this disparity have called it a form of “institutional racism.”⁵⁴

Research on student discipline demonstrates that minority students receive a disproportionate measure of discipline for their misbehavior in schools.⁵⁵ “When minority and non-minority students engage in an identical discipline infraction, minority students receive harsher punishments by school officials [than do their white counterparts].”⁵⁶ This might explain why underprivileged black students are disproportionately represented in AEPs across the country. In Texas, for example, data for one school district recently revealed that while 28% of its student enrollment was black, 43% of those diverted into AEPs were black.⁵⁷

Some studies suggest that the racially disparate enrollment trends can be attributed to a lack of classroom management skills among inexperienced teachers.⁵⁸ For example, an analysis of case study data covering elementary school disciplinary referrals in Texas revealed that over 80% of the referrals came from inexperienced teachers who lacked the skills necessary to manage diverse student bodies.⁵⁹ One school in the case study showed that “75% of the discipline referrals were for African American males on a campus with a less than 20% African American male student population.”⁶⁰

There is some criticism that making AEPs available actually exacerbates the problems related to school violence and mismanaged classrooms. Some suggest that exclusionary tactics present “band aid” solutions that fail to treat the underlying problems that cause students to act out in the first

49. Reyes, *supra* note 3, at 539.

50. See Wren, *supra* note 3, at 353.

51. See Reyes, *supra* note 3, at 548.

52. Reed, *supra* note 15, at 608.

53. *Id.*

54. *Id.* at 608–09.

55. Reyes, *supra* note 3, at 548.

56. *Id.*

57. *Id.* at 549.

58. *Id.* at 547.

59. *Id.*

60. Reyes, *supra* note 3, at 547.

place.⁶¹ Moreover, the National School Boards Association found that exclusionary practices, in general, actually reward teachers for avoiding classroom responsibilities.⁶² Further, the Association warned “removing troublemakers ... often harden[s] delinquent behavior patterns, alienate[s] troubled youths from the schools, and foster[s] distrust.”⁶³

III. THE FORM AND FUNCTION OF THE TYPICAL ALTERNATIVE EDUCATION PROGRAM

AEPs typically combine a personalized curriculum and smaller class size with the stringent restrictions and social controls found in correctional institutions. Many have no grades and no homework requirements.⁶⁴ They may offer attendance incentives and self-paced schedules.⁶⁵ In addition, AEPs frequently focus on conflict resolution and behavior modification courses, and often offer outreach services for students’ families.⁶⁶ In most school systems, the overt goal is to return the student to the traditional school setting after being placed temporarily in an AEP.⁶⁷

School district policies governing student placement in an AEP vary. Some school districts will place a student in a disciplinary AEP for horseplay, copying another student’s work, inappropriate displays of affection, or loitering in unauthorized areas.⁶⁸ Others, however, resort to AEP placement for students who commit more serious legal and school policy violations.

Although there is some variation across school districts with regard to placement procedures, the policies and procedures adopted by public schools throughout North Carolina are relatively common. The State’s POLICIES AND PROCEDURES FOR ALTERNATIVE LEARNING PROGRAMS AND SCHOOLS manual⁶⁹ provides a comprehensive set of procedures used to place a student in an AEP.

The first step in the process is labeling a student “at risk.” Exactly what the term means in its technical sense may vary from one school system to the

61. See Falk, *supra* note 42, at 469; Wren, *supra* note 3, at 349.

62. Wren, *supra* note 3, at 332.

63. *Id.*

64. *Id.* at 344.

65. *Id.*

66. *Id.* at 345.

67. Wren, *supra* note 3, at 344.

68. Reyes, *supra* note 3, at 543–44.

69. NORTH CAROLINA DEPARTMENT OF PUBLIC INSTRUCTION, POLICIES AND PROCEDURES FOR ALTERNATIVE LEARNING PROGRAMS AND SCHOOLS GRADES K-12 (2003), <http://www.ncpublicschools.org/docs/schoolimprovement/alternative/learning/alpmanual.pdf> [hereinafter POLICIES AND PROCEDURES].

next. North Carolina Public Schools describe an “at risk” student as “a young person who, because of a wide range of individual, personal, financial, familial, social, behavior or academic circumstances, may experience school failure or other unwanted outcomes unless intervention occurs to reduce the risk factors.”⁷⁰

Under North Carolina’s transfer scheme, circumstances which place students at risk include:

- a. not meeting state/local/proficiency standards,
- b. grade retention,
- c. unidentified or inadequately addressed learning needs,
- d. alienation from school,
- e. unchallenging curricula and/or instruction,
- f. tardiness and/or poor school attendance,
- g. negative peer influence,
- h. unmanageable behavior,
- i. substance abuse and other health risk behaviors,
- j. abuse and neglect,
- k. inadequate parental, family, community and/or school support,
- l. limited English proficiency *or*
- m. *other risk factors*.⁷¹

According to the *Policies and Procedures* manual, a student transferred as a result of poor academic performance and/or disruptive conduct is generally referred by parent, teacher, and/or school administrator to a student assistance team or child study team.⁷² This team is comprised of at least one

70. *Id.* at 10.

71. *Id.*

72. *Id.*

school or “area” administrator, curriculum specialist, teacher, school psychologist, and hopefully, the parents.⁷³

The student assistance team reviews evidentiary information supporting transfer, documents the individuals involved in the decision, documents parental participation, or lack thereof, develops an action plan, reviews progress, and recommends whether or not to transfer a student.⁷⁴ If a student is transferred, this body is also typically responsible for facilitating successful transition into and, hopefully, out of the alternative school.⁷⁵

North Carolina also requires the student assistance team to submit a report to a “multi-disciplinary team,” which makes a final placement decision.⁷⁶ The multi-disciplinary team is considered to be “necessary to keep the decision-making process open, and it increases objectivity [and] fairness.”⁷⁷

When a student subject to transfer is also disabled (and therefore has an individual education plan [“IEP”]), there are further procedures. Such procedures center on the continuity and execution of the IEP from one school to the next, and remain focused on determining whether the transferee alternative school provides the same educational services for the student.⁷⁸

IV. THE LEGAL LANDSCAPE

School administrators and attorneys should beware the many legal pitfalls associated with the decision to transfer a student into an AEP. This part views the legal landscape of AEP administration through the lenses of federal and state law in order to expose those pitfalls. In light of relevant case law, the first section of this part considers the impact of an AEP transfer on the rights of the traditional K-12 student under federal law and under state law. The second section then turns to the impact of an AEP transfer on the more particularized rights of the exceptional K-12 student.

A. *Rights to an Education Under the Federal Constitution*

Federal courts have generally found that a student does not have a constitutional right to particular incidents of education such as participation in

73. *Id.*

74. POLICIES AND PROCEDURES, *supra* note 69, at 10–11.

75. *Id.*

76. *Id.* at 12.

77. *Id.*

78. *Id.* at 13.

interscholastic activities,⁷⁹ enrollment in advanced placement classes,⁸⁰ or attending the school of their choice.⁸¹ However, as discussed in more detail below, there may be legal claims cognizable under federal law that can arise from one's placement into an AEP.

In *San Antonio Independent School District v. Rodriguez*,⁸² the United States Supreme Court held that there is no fundamental right to an education under the United States Constitution.⁸³ The *Rodriguez* holding was reaffirmed, although somewhat qualified, by *Plyler v. Doe*,⁸⁴ where the Court again stated that education is not a fundamental right—but there could be no rational basis for the *complete denial of education* unless that deprivation “furthers some substantial goal of the State.”⁸⁵ Despite its refusal to treat education as a fundamental right, in *Goss v. Lopez*,⁸⁶ the United States Supreme Court determined that states are constrained to recognize a student's legitimate entitlement to a public education as a property interest that is protected by the Fourteenth Amendment's Due Process Clause.⁸⁷ It also held that students have a reputation liberty interest in not being excluded from school for good cause.⁸⁸ In light of these constitutional constraints, the Court determined that a suspension of ten days or less only requires notice, an explanation of the evidence against the student, and an opportunity for him to be heard.⁸⁹

Of course, in its landmark decision in *Brown v. Board of Education*, the Supreme Court also held that where a state chooses to provide its citizens with a public education, the Equal Protection Clause of the Fourteenth Amendment requires that such education be provided equally to all citizens, and that segregation on the basis of race violates the Equal Protection Clause.⁹⁰

In several of the cases reviewed below, the respective plaintiffs have challenged school officials' AEP transfer decisions as a violation of their rights under the Fourteenth Amendment's Equal Protection and Due Process Clauses. As a point of clarification, it is important at this juncture to distin-

79. See *Walsh v. La. High Sch. Athletic Ass'n*, 616 F.2d 152, 156 (5th Cir. 1980).

80. *Seamons v. Snow*, 84 F.3d 1226, 1234–35 (10th Cir. 1996).

81. See *Zamora v. Pomeroy*, 639 F.2d 662, 668–70 (10th Cir. 1981).

82. 411 U.S. 1 (1973).

83. See *id.* at 35.

84. 457 U.S. 202 (1982).

85. See *id.* at 223–24.

86. 419 U.S. 565 (1975).

87. *Id.* at 576.

88. *Id.*

89. *Id.* at 582.

90. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

guish between the substantive and procedural components of the Fourteenth Amendment's Due Process Clause before delving into the case law.

The procedural due process challenges in all of the cases below consider the overall fairness of the exclusionary procedures underlying an AEP transfer, and whether those procedures were indeed implemented. In *Mathews v. Eldridge*,⁹¹ the Supreme Court articulated factors to take into consideration when determining how much process is due when the government deprives someone of disability insurance.⁹² The procedures sought in school-related due process claims are not significantly different.⁹³ Courts will consider: 1) "the private interest that will be affected by the official action;" 2) "the risk of an erroneous deprivation of [the] interest . . . and the probable value, if any, of additional or substitute procedural safeguards;" and 3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement[s] would entail."⁹⁴

As demonstrated by the case law below, under Fourteenth Amendment procedural due process analysis, courts generally find no violation if the school officials gave the subject student notice and a right to be heard before AEP transfer. The analytical framework applied to substantive due process challenges is more involved and complex. Perhaps the best and most concise explanation of this framework was offered by Justice Stevens in *Daniels v. Williams*,⁹⁵ a case resolved by the Court in 1986. In *Daniels*, Justice Stevens explained that the Fourteenth Amendment "contains a substantive component, sometimes referred to as 'substantive due process,' which bars certain arbitrary government actions 'regardless of the fairness of the procedures used to implement them.'"⁹⁶

Because there is no explicit or fundamental constitutional right to an education under the United States Constitution, claims for deprivation of substantive due process rights under the Fourteenth Amendment are subject only to "rational basis" scrutiny.⁹⁷ Under the rational basis standard of review, a court need only determine if the school official's action was *rationally related* to the promotion of a *legitimate* state interest.⁹⁸ If so, there is no

91. 424 U.S. 319 (1976).

92. *Id.* at 323, 334–35.

93. *See* Falk, *supra* note 42, at 461–62.

94. *Eldridge*, 424 U.S. at 335.

95. 474 U.S. 327 (1986).

96. *Id.* at 337.

97. *Craig v. Selma City Sch. Bd.*, 801 F. Supp. 585, 594 (S.D. Ala. 1992).

98. *Id.* at 595.

violation of a student's substantive due process rights.⁹⁹ Generally speaking, a violation only arises where the school's academic decision is "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment."¹⁰⁰

The cases below—all of which involve the transfer of traditional students into AEPs—have tested the contours of the Supreme Court's Fourteenth Amendment analytical framework as applied to a student's rights to a public education. In all of the cases, it is abundantly clear that rather than appreciating the "opportunity" to attend an alternative program, the subject plaintiffs viewed the transfer into an AEP as a harsh, exclusionary, and disciplinary measure analogous to an expulsion.¹⁰¹

In *Zamora v. Pomeroy*, the mother of a high school student brought action against a school board superintendent under 42 U.S.C. § 1983, claiming that her son's civil rights were violated when he was transferred to an alternative school after contraband was found in his locker.¹⁰² Notably, the superintendent in that case characterized the alternative school as one which enrolled potential drop-outs and offered easier courses than were offered to the average student in the traditional school.¹⁰³ Plaintiff claimed that he was not given fair notice and an opportunity to be heard before being transferred to a school that lacked the academic standing of his original school.¹⁰⁴

The district court granted summary judgment in favor of defendant school superintendent and plaintiff appealed.¹⁰⁵ The Tenth Circuit affirmed, explaining that absent a showing that the alternative school assignment was not "substantially prejudicial," plaintiff lacked standing.¹⁰⁶ The court came to this conclusion only after explicitly acknowledging that the student was readmitted to and graduated from his old high school.¹⁰⁷ As to the procedural

99. *Id.*

100. *Id.* (quoting *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985)).

101. *Wren*, *supra* note 3, at 354.

102. 639 F.2d 662, 663 (10th Cir. 1981).

103. *Id.* at 665.

104. *See id.* at 664.

105. *Id.* at 667.

106. *Id.* at 670. Specifically, the court stated:

[i]nasmuch as the sanctions imposed were far less severe than expulsion, and in view of the fact that his offense was serious, it cannot be said that they evidence an injury within the framework of the constitution, one which is capable of supporting jurisdiction of this court. The Zamoras' allegations that the ESC was so inferior to amount to an expulsion from the educational system are not borne out by the record, and in the absence of a clear showing that the ESC assignment was substantially prejudicial, the Zamoras lack the requisite standing to attack the appellees' actions on that ground.

Zamora, 639 F.2d at 670.

107. *Id.* at 669.

due process issue, it also acknowledged that he was given five occasions to explain and defend himself prior to the transfer.¹⁰⁸

Interestingly, without inquiring into the nature of the alternative school or the services rendered there, the court expressly concluded that the “sanction” of transfer was less severe than an expulsion, which, by implication, would be more deserving of heightened procedural safeguards.¹⁰⁹

Similarly, in *Buchanan v. City of Bolivar*,¹¹⁰ a junior high school student’s mother brought suit against her son’s school principal under § 1983, claiming that the principal’s decision to transfer her son to an alternative school as a form of discipline deprived him of his rights to procedural due process and equal protection.¹¹¹ She further alleged that the principal and two police officers discriminated against her son on the basis of his race.¹¹²

In that case, a junior high school student threw a rock that caused damage to an assistant principal’s car.¹¹³ The assistant principal witnessed the destructive behavior first-hand and contacted police, who took the student into their custody.¹¹⁴ The police released custody of the student to his mother four hours later, and the student was not prosecuted.¹¹⁵ However, the assistant principal determined that discipline was appropriate and allowed the mother and her son “to choose between serving a ten day at-home suspension or attending an alternative school for ten days. Plaintiff opted [for the] alternative school and signed an agreement indicating her consent to her son’s attendance at alternative school.”¹¹⁶

Although the district court granted summary judgment in favor of defendant, the Sixth Circuit reversed and remanded the case.¹¹⁷ The court acknowledged that students facing suspension from school possess property rights under the Due Process Clause of the Fourteenth Amendment.¹¹⁸ Applying the *Goss* rule to the facts, the Sixth Circuit found no evidence in the record as to what type of conversations took place between plaintiff, her son, and the school officials.¹¹⁹ Furthermore, the court found neither evidence that the school officials informed plaintiff of the reasons behind their deci-

108. *Id.* at 668.

109. *Id.* at 670.

110. 99 F.3d 1352 (6th Cir. 1996).

111. *Id.* at 1355, 1358–60.

112. *Id.* at 1355, 1360.

113. *Id.* at 1354.

114. *Id.* at 1354–55.

115. *Buchanan*, 99 F.3d at 1355.

116. *Id.*

117. *Id.* at 1360.

118. *Id.* at 1359.

119. *Id.*

sion to transfer the student nor evidence showing that they gave him an opportunity to present his side of the story.¹²⁰ The Sixth Circuit remanded for the district court to develop the record.¹²¹

As to plaintiff's equal protection and race discrimination claims, the circuit court affirmed the lower court's ruling in favor of defendants.¹²² The court explained that while the assistant principal filed an affidavit stating that he treated plaintiff's son no differently than any other student, plaintiff did not carry her burden of providing evidence to the contrary to survive summary judgment.¹²³ The Sixth Circuit affirmed the denial of plaintiff's race discrimination claims for the same reasons.¹²⁴

In *Nevares v. San Marcos Consolidated Independent School District*,¹²⁵ the father of a fifteen-year-old high school student brought an action against the school district challenging his son's transfer to an alternative education program based on the fact that the student was detained by police for conduct punishable as a felony (again, throwing rocks at a car).¹²⁶ Weeks after the incident, the school received a police report of the detention and the assistant principal pulled the subject student from class.¹²⁷ The student was reassigned to an alternative school for "students whose violations . . . fall short of triggering suspension or expulsion, but for reasons of safety and order must be removed from the regular classroom."¹²⁸

The district court held that the statute that permitted such a transfer without prior hearing was unconstitutional, and the school district appealed.¹²⁹ The Fifth Circuit held that the student lacked standing to challenge the statute or seek injunctive relief absent deprivation of a federally protected property or liberty interest.¹³⁰ Specifically, like the Tenth Circuit in *Zamora*, the Fifth Circuit found no due process violation because "no protected property interest [was] implicated in a school's denial to offer a student a particular curriculum."¹³¹

120. *Buchanan*, 99 F.3d at 1359.

121. *Id.*

122. *Id.* at 1360.

123. *Id.*

124. *Id.*

125. 111 F.3d 25 (5th Cir. 1997).

126. *See id.* at 26.

127. *Id.*

128. *Id.*

129. *Id.*

130. *See Nevares*, 111 F.3d at 26.

131. *Id.* at 27.

In *C.B. v. Driscoll*,¹³² two students brought § 1983 actions against the school board after it took exclusionary disciplinary measures against them.¹³³ One student, C.B., was suspended for “nine days for the possession of a ‘look-alike’ illegal substance.”¹³⁴ After the suspension, the principal transferred C.B. to an “‘alternative school’ where C.B. would do work assigned by [his] regular teachers . . . C.B. then withdrew from school and filed [the] lawsuit. Later, tests revealed the substance not to be marijuana.”¹³⁵

C.B. claimed “that his procedural due process rights were violated because he was suspended without adequate notice or hearing.”¹³⁶ Affirming the district court’s ruling in favor of defendants on their motion for summary judgment,¹³⁷ the Eleventh Circuit stated “once school administrators tell a student what they heard or saw, ask why they heard or saw it, and allow a brief response, a student has received all the process that the Fourteenth Amendment demands.”¹³⁸ Finding that C.B. had two opportunities to discuss his acts, the court affirmed the lower court’s decision.¹³⁹ The district court also granted summary judgment in favor of defendants on C.B.’s claim that his substantive due process rights were violated by the decision to send him to an alternative school.¹⁴⁰ The Eleventh Circuit affirmed the district court’s holding once again.¹⁴¹ The circuit court stated that executive acts such as the decision to send C.B. to an alternative school “warrant no substantive due process protection unless the right infringed is recognized by the Constitution as ‘fundamental,’ which is to say that ‘our democratic society and its inherent freedoms would be lost if that right were to be violated.’”¹⁴² The court explained that “[b]ecause the right to an education is state-created, that right can be restricted as long as adequate procedures are followed.”¹⁴³ Accordingly, the court rejected the substantive due process claim.¹⁴⁴

Interestingly, in a footnote, the Eleventh Circuit also expressed doubt that C.B. had a property interest under Georgia law in attending his traditional high school instead of attending the alternative school to which he was

132. 82 F.3d 383 (11th Cir. 1996).

133. *See id.* at 385.

134. *Id.*

135. *Id.* at 385.

136. *Id.* at 388.

137. *C.B.*, 82 F.3d at 385.

138. *Id.* at 386.

139. *Id.* at 388–89.

140. *Id.* at 389.

141. *Id.*

142. *C.B.*, 82 F.3d at 389.

143. *Id.*

144. *Id.*

assigned.¹⁴⁵ In support of this notion, the court cited *Doe v. Bagan*,¹⁴⁶ where the Tenth Circuit suggested that the right to a public education does not encompass “a right to choose one’s particular school.”¹⁴⁷

In *Bagan*, a mother brought suit under § 1983 on behalf of her nine-year-old son against two caseworkers for the Colorado Department of Social Services and other individuals for actions arising out of an investigation of John Doe, the son, on suspicion of possible child abuse.¹⁴⁸ After learning of a possible incident of sexual assault on a five-year-old girl, Bagan, one of the caseworkers, contacted Doe’s school to arrange an interview.¹⁴⁹ He spoke to Doe alone in the principal’s office for approximately ten minutes, and Doe denied the abuse.¹⁵⁰ Bagan later discussed the matter with Doe’s mother.¹⁵¹ Ultimately, for reasons unstated in the opinion, Doe’s name was placed on a state registry as a child abuser.¹⁵² Plaintiffs alleged that Doe subsequently endured humiliation at the hands of his classmates when they learned of the suspicion against him.¹⁵³ Although Doe’s mother attempted to transfer him to another school, her request was refused because Doe’s special education needs purportedly could not be fully met by the transferee school.¹⁵⁴

Plaintiffs claimed that defendants violated Doe’s due process rights by destroying his reputation that ultimately led to his denial of his state-guaranteed right to an education.¹⁵⁵ The Tenth Circuit affirmed the district court’s grant of summary judgment in favor of defendants.¹⁵⁶

Although the court acknowledged that school age children in Colorado must be given the opportunity to receive a free public education, the court found it obvious that Doe was not deprived of this right.¹⁵⁷ Rather, the court determined that Doe “was only denied his request to attend the public school of his choice. Plaintiffs cite no Colorado authority, and we have found none, indicating that the right to a public education encompasses a right to choose one’s particular school.”¹⁵⁸

145. *Id.* at 389 n.5.

146. 41 F.3d 571 (10th Cir. 1994).

147. *C.B.*, 82 F.3d at 389 (quoting *Doe v. Bagan*, 41 F.3d 571, 576 (10th Cir. 1994)).

148. *Bagan*, 41 F.3d at 573.

149. *Id.* at 574.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Bagan*, 41 F.3d at 575–76.

154. *Id.* at 576 n.5.

155. *Id.* at 575–76.

156. *Id.* at 577.

157. *Id.* at 576.

158. *Bagan*, 41 F.3d at 576.

Taken together, *Driscoll* and *Bagan* suggest that substantive due process claims can only succeed where the transferee alternative school is found to be so bereft of educational opportunity that enrollment in such a program is paramount to no education at all. One should note, however, that the student in *Bagan* did not claim that his *state* constitutional rights were violated. As explained in some detail below, education opportunity is a fundamental right under certain state constitutions. Therefore, it may be possible to successfully state a substantive due process claim for deprivation of a state-guaranteed right to a public education by transfer into an AEP where the plaintiff proves that the AEP is paramount to no education at all.

B. *Student Rights to an Education Under Various State Constitutions*

"Every state constitution has an education clause. The highest courts of many states have held that their state constitutions' education clauses afford individuals an enforceable right to education."¹⁵⁹ In California and Pennsylvania, education is considered a fundamental right under the state constitution.¹⁶⁰ Florida's constitution provides that "education of children is a fundamental value" of the state.¹⁶¹

The Supreme Court of Kentucky stated that "[a] child's right to an adequate education is a fundamental one under our Constitution."¹⁶² Pennsylvania's highest court declared the same in *School District of Wilkinsburg v. Wilkinsburg Education Ass'n*.¹⁶³ In *Horton v. Meskill*,¹⁶⁴ the Supreme Court of Connecticut stated that "the right to education is so basic and fundamental that any infringement of that right must be strictly scrutinized."¹⁶⁵ The Supreme Courts of North Dakota, Wisconsin, and Virginia have also found that education is a fundamental right under their states' constitutions.¹⁶⁶

It follows that a student's state equal protection¹⁶⁷ and due process claims arising out of their transfer into an AEP would more likely succeed where their state recognizes a fundamental or enforceable right to education.¹⁶⁸

159. Reed, *supra* note 15, at 582.

160. *Id.* at 583.

161. FLA. CONST. art. IX, § 1.

162. *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989).

163. 667 A.2d 5, 9 (Pa. 1995).

164. 376 A.2d 359 (Conn. 1977).

165. *Id.* at 373.

166. Reed, *supra* note 15, at 598–600.

167. *Id.* at 596–97. Several state courts have determined that education is a fundamental right for the purposes of an equal protection analysis under their states' constitutions. *Id.*

168. *Id.* at 591.

Where a student challenges a state action that discriminates against him on the basis of his race, courts will review the state action on a strict scrutiny basis.¹⁶⁹ Under strict scrutiny review, a court will determine whether the state action is narrowly tailored to the promotion of a compelling government interest.¹⁷⁰ Courts will also apply this standard of review where the basis of a student's challenge is the complete deprivation of a fundamental right.¹⁷¹

The Supreme Court of Wisconsin's decision in *Kukor v. Grover*, is illustrative as to a state court's treatment of the issue of educational deprivation where education is a fundamental right under the state's constitution.¹⁷² In *Kukor*, a group of taxpayers and residents sued Wisconsin's Superintendent of Public Instruction and Wisconsin's Department of Revenue, attacking the constitutionality of a state formula of school funding.¹⁷³ The plaintiffs argued that because the funding formula did not address the greater financial needs of poor school districts (such as offering more dropout prevention units), the formula violated the educational uniformity requirement under the state constitution and the equal protection rights of underprivileged students under Wisconsin's state constitution.¹⁷⁴

Although the Supreme Court of Wisconsin found that the districts with a high concentration of poverty faced an "overburden" in the area of dropout prevention programs for high-risk youth,¹⁷⁵ it held that the funding formula did not unconstitutionally impinge on the state constitution's uniformity requirement.¹⁷⁶

The court also ruled unfavorably to plaintiffs' equal protection claims.¹⁷⁷ Importantly, the court interpreted plaintiffs' claims as challenging the funding formula and not as challenging state action depriving students of educational opportunity.¹⁷⁸ Acknowledging that an "equal opportunity for education" is a fundamental right under Wisconsin's constitution, the court found that such a right was not implicated by the challenged spending dispar-

169. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

170. *Kukor v. Grover*, 436 N.W.2d 568, 582 n.13 (Wis. 1989).

171. *Id.* at 579.

172. See *id.* at 568-94.

173. *Id.* at 570.

174. *Id.* at 573.

175. *Kukor*, 436 N.W.2d at 573.

176. *Id.* at 578.

177. *Id.* at 579.

178. *Id.*

ity.¹⁷⁹ With this characterization of plaintiffs' claim, the court applied a rational basis review and found the funding formula constitutional.¹⁸⁰

Kukor suggests that a student challenging a transfer into an AEP may only successfully state an equal protection claim where the right to education is a fundamental right under the state constitution and where the student alleges a complete deprivation of that right by way of a transfer to the alternative program.¹⁸¹ Obviously, this is an onerous burden.

C. *The Particularized Rights of Exceptional Students Under Federal Law*

Students sent to AEPs are often learning disabled.¹⁸² In Texas, for example, twenty percent of all students served statewide in 1996-1997 were characterized as special education or special needs students under federal law.¹⁸³ Accordingly, school administrators should take note of the legal issues particularly pertaining to the transfer of an exceptional student into an AEP. The Rehabilitation Act of 1973 provides, *inter alia*, that:

[n]o otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.¹⁸⁴

Further, the Individuals with Disabilities Education Act ("IDEA")¹⁸⁵ provides, *inter alia*, that a state qualifying for federal assistance under the Act must establish:

[p]rocedures to ensure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of children with disabilities will be selected and administered so as not to be racially or culturally discriminatory . . . [N]o single procedure shall be the sole criterion for determining an appropriate educational program for a child.¹⁸⁶

179. *Id.*

180. *Kukor*, 436 N.W.2d at 579.

181. *See id.* at 579-80.

182. Wren, *supra* note 3, at 352.

183. Bickerstaff, *supra* note 39, at 38.

184. 29 U.S.C. § 794(a) (2000).

185. 20 U.S.C. §§ 1400-1461 (2000).

186. § 1412(a)(6)(B).

As a condition for federal financial assistance, IDEA requires states to ensure a “free appropriate public education” for all disabled students.¹⁸⁷ The Act establishes a comprehensive system of procedural safeguards for ensuring this right, including the so-called “stay-put” provision, which directs that a disabled child “shall remain in [his or her] then-current educational placement” pending completion of any review proceedings unless the parents and state or local educational agencies agree otherwise.¹⁸⁸ This is one of the most frequently contested safety measures under IDEA.¹⁸⁹

Originally, IDEA was a response by Congress to the growing need to educate disabled students who were essentially abandoned by public schools.¹⁹⁰ In the congressional studies behind the formulation of the Act, Congress found that one out of every eight disabled students was excluded from the public school system altogether.¹⁹¹ Congress also found that “many others were simply ‘warehoused’ in special classes or were neglectfully shepherded through the system until they were old enough to drop out.”¹⁹² What is more disturbing is congressional statistics revealed that in 1974, the states failed to meet the educational needs of eighty-two percent of all children with emotional disabilities.¹⁹³

IDEA “confers upon disabled students an enforceable substantive right to public education in participating [s]tates.”¹⁹⁴ It also assures that, to the maximum extent possible, states will “mainstream” disabled students, “i.e. . . . educate them with children who are not disabled.”¹⁹⁵ Further, the Act assures that disabled students will be segregated or otherwise removed from the regular classroom setting “only when the nature or severity of the handicap is such that education in regular classes . . . cannot be achieved satisfactorily.”¹⁹⁶ Of course, IDEA also requires that an individualized education program (“IEP”) be constructed, reviewed, and, if necessary, revised at least once a year to ensure that the needs of the disabled student are being met.¹⁹⁷

187. § 1412(a)(1)(A).

188. § 1415(j).

189. Elizabeth A. Bunch, *School Discipline Under the Individuals with Disabilities Education Act: How the Stay-Put Provision Limits Schools in Providing a Safe Learning Environment*, 27 J. L. & EDUC. 315, 316 (1998).

190. See *Honig v. Doe*, 484 U.S. 305, 309 (1988).

191. *Id.*

192. *Id.* (citing H.R. REP. NO. 94-332, at 2 (1975)).

193. *Id.* (citing S. REP. NO. 94-168, at 8 (1975)).

194. *Id.* at 310.

195. *Honig*, 484 U.S. at 311.

196. *Id.* (quoting 20 U.S.C. § 1412(5), current version at 20 U.S.C. § 1412(a)(5) (2000)).

197. *Id.*

IDEA provides procedural safeguards related to placement.¹⁹⁸ First, it grants parents the right to review “all relevant records pertaining to the identification, evaluation, and educational placement of their child.”¹⁹⁹ Second, it provides them with prior written notice with respect to changes in placement.²⁰⁰ Third, it gives them an opportunity to present complaints.²⁰¹ Finally, it provides them “an opportunity for ‘an impartial due process hearing’ with respect to any such complaints.”²⁰² At the conclusion of any such hearing, parents and the educational agency may seek administrative review and then file a civil action.²⁰³

The landmark case dealing with exclusion of an exceptional student in light of IDEA was *Honig v. Doe*.²⁰⁴ In that case, the parents of two emotionally handicapped students challenged the school board’s unilateral exclusion of their children from the traditional classroom for purportedly dangerous and disruptive conduct stemming from their disabilities.²⁰⁵ In both instances, the school, pursuant to the *California Education Code*, placed the students at issue on indefinite suspension pending the completion of expulsion proceedings.²⁰⁶ The *Honig* Court found that the code violated the stay-put provision of the EHA.²⁰⁷

Recognizing the school officials’ limited rights to suspend students for a period of ten days or less, the Court intimated that schools are not without recourse in keeping students out of the school at the conclusion of that period.²⁰⁸ Rather, it found nothing in the Act, preventing schools from seeking to enjoin a dangerous child from attending the school.²⁰⁹ In such a case, a school would have the burden of showing that administrative review would be futile.²¹⁰ They would also have to overcome the presumption in favor of the child’s current placement by showing that maintaining the child in such a placement “is substantially likely to result in injury either to himself or herself, or to others.”²¹¹

198. *Id.*

199. *Id.* at 312.

200. *Honig*, 484 U.S. at 312.

201. *Id.*

202. *Id.*

203. *Id.*

204. 484 U.S. 305 (1988).

205. *Id.* at 312–14.

206. *Id.* at 313 & n.2, 315.

207. *See id.* at 328 & n.10.

208. *Id.* at 327–28.

209. *Honig*, 484 U.S. at 327.

210. *Id.*

211. *Id.* at 328.

Some argue that, as a result of *Honig*, schools lack the flexibility needed to adequately deal with disruptive students who happen to be learning disabled.²¹² Indeed, some contend that they lack flexibility with traditional students who might allege a disability after being subjected to an exclusionary disciplinary measure.²¹³

Indeed, the Ninth Circuit, in *Hacienda La Puente Unified School District of Los Angeles v. Honig*,²¹⁴ held that the protection afforded by IDEA is not limited to those children who had been diagnosed with a disability prior to their misconduct.²¹⁵ Thus, the holding explicitly allows students to claim to have a disability under IDEA at any time before or after disciplinary action is taken, and thus misuses the stay-put provision to avoid punishment.²¹⁶ At least one scholar suggests that expelling a child immediately pending the due process hearing is one way to avoid this "loophole."²¹⁷

*Randy M. v. Texas City ISD*²¹⁸ is also illustrative. There, the mother of a special education student filed an application for an injunction to prevent the school district from placing the student into an AEP.²¹⁹ In that case, "Randy, acting in concert with another male student, ripped the break-away wind pants off a female student."²²⁰ Because he was disabled, the placement was abated until an admission review and dismissal committee determined whether Randy's actions manifested from his disability.²²¹ The committee concluded that they did not, and decided to transfer Randy to the AEP for the remainder of the school year.²²² The United States District Court for the Southern District of Texas held in favor of the school district and declined to enter an injunction.²²³

Interestingly, as to plaintiff's contention that Randy's misbehavior might have been due to an unidentified disability, the court determined that the committee "bent over backwards" to give her an opportunity to gather and present evidence of an unrecognized disability which may have caused him to rip off the student's pants.²²⁴ Thus, the case provides a good example

212. Bunch, *supra* note 189, at 318.

213. *Id.*

214. 976 F.2d 487 (9th Cir. 1992).

215. *Id.* at 494.

216. Bunch, *supra* note 189, at 318.

217. *Id.* at 320.

218. 93 F. Supp. 2d 1310 (S.D. Tex. 2000).

219. *Id.* at 1310.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Randy M.*, 93 F. Supp. 2d at 1311.

224. *Id.*

of how districts may protect themselves from the “loophole” in IDEA by providing a potential litigant every reasonable opportunity to prove that the student’s misconduct was attributable to an unidentified disability before sending the child into an AEP.²²⁵

In light of the relevant case law, critics of IDEA argue that it must be changed to allow schools to remove dangerous and consistently disruptive students from the regular classroom in order to ensure a safe and productive learning environment for all students.²²⁶

V. REDUCING LEGAL EXPOSURE AND ADHERING TO THE *BROWN* MORAL IMPERATIVE

School officials and legal practitioners should seriously evaluate the legal exposure that can arise from a student’s transfer into an AEP. Based on the case law discussed in this article, it appears that students subject to transfer into an AEP may have the ability to set forth claims that are cognizable under both federal and state law if the conditions are right.

Although the United States Supreme Court has repeatedly held that education is not a fundamental right, in light of such cases as *Goss*, *Plyler*, and *Ewing*, there may be reason to apply a heightened standard of scrutiny in the face of a Fourteenth Amendment Due Process challenge for transfer into an AEP where a student can show on the record that his transfer into such a program resulted in the outright deprivation of his educational opportunity. The Eleventh Circuit hinted at this sentiment in *C.B.* when it noted in the face of a substantive due process claim that the state may only restrict educational opportunity.²²⁷

If, indeed, the AEP is shown to be absolutely bereft of any educational opportunity, it is likely that a federal court would at least find standing for a substantive due process claim, since an outright deprivation of education would undoubtedly constitute “a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.”²²⁸

Conversely, it is highly doubtful that a student can successfully challenge an AEP transfer as a violation of his or her procedural due process rights under the Fourteenth Amendment even where there are only slight procedural protections. As the Eleventh Circuit succinctly stated in *C.B.*, “once school administrators tell a student what they heard or saw, ask why

225. See Bunch, *supra* note 189, at 318.

226. See *id.* at 320.

227. See *C.B. v. Driscoll*, 82 F.3d 383, 389 (11th Cir. 1996).

228. *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985).

they heard or saw it, and allow a brief response, a student has received all the process that the Fourteenth Amendment demands.”²²⁹ Even the most rudimentary procedures underlying a school official’s decision to transfer the student into an AEP would likely pass constitutional muster under a Fourteenth Amendment procedural due process attack.

Finally, as to cases arising under state law, school officials and legal practitioners should be particularly aware of their exposure where the state constitution recognizes education as a fundamental right. In such states, litigants opposing transfer into an AEP will likely achieve strict scrutiny review if they show that the AEP is completely devoid of academic opportunities. If the litigant in such a case is able to show on the record that the AEP at hand is indeed the “dumping ground” described by so many of the critics of AEPs, a school official’s decision to transfer a student into such a program may be deemed unconstitutional as the transfer would effect the complete deprivation of the student’s fundamental right to an education.

Beyond these most basic requirements of the law, however, school officials should also evaluate their compliance with the moral imperative articulated by the *Brown* Court more than fifty years ago when considering whether to implement a program like an AEP.²³⁰ In *Brown*, Chief Justice Warren stated:

[education] is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.²³¹

In light of this statement, and in view of the opinion as a whole, it is abundantly clear the *Brown* Court understood that schools do more than just teach academic skills; they also develop the social skills necessary to achieve in an adult society. As one scholar recently noted:

[s]ociety itself has deep and legitimate interests in social reproduction—the intellectual, moral, and social development of the present youth who must become society’s leaders in all fields of endeavor The collective future of our schools (a majority of whose students are expected to be nonwhite by 2020) and our society (a majority of whose members are expected to be nonwhite

229. *C.B.*, 82 F.3d at 386.

230. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

231. *Id.*

by the middle of the 21st century), depends upon educating citizens who will be able to live and work comfortably across racial lines.²³²

In the face of these realities, there is ample evidence which suggests that our schools systematically deprive the nation's unruly minority students the very kind of opportunities discussed by the *Brown* Court by cordoning them off from the rest of their traditional school counterparts with their placement into AEPs. Even if the AEPs offer the same academic opportunities offered by the transferor schools, the only environment to which such students may "adjust normally" is one of isolation rather than integration.

Since the United States Department of Education first released the infamous "Coleman Report" in 1966, scholars have long recognized that a student's "achievement is strongly related to the educational backgrounds and aspirations of the other students in the school" and classroom.²³³

The report concluded, in fact, that the *social* characteristics of a school's student body were the single most important school-related factor in predicting minority student achievement: "Attributes of other students account for far more variation in the achievement of minority group children than do any attributes of school facilities and slightly more than do attributes of staff."²³⁴

It follows that the systematic exclusion and isolation of unruly minority students through placement into AEPs ultimately frustrates *Brown's* most basic promise.²³⁵ Although school officials may contend that the AEPs offer staff, curricula, and facilities exactly like that of the transferor school (an argument that still arises long after the "separate but equal doctrine" was purportedly obliterated by *Brown*), while easing the work of traditional school teachers and enhancing the education of those who "want to learn," these officials cannot credibly assert that such programs meet the moral imperative articulated by the *Brown* Court.

School officials and legal practitioners should recognize that AEPs will not, and indeed cannot, meet the dictates of *Brown* so long as they function on a philosophical framework contrary to the original mission of traditional schools. An AEP should not be created to function as a "soft jail" that keeps

232. John Charles Boger, *Education's "Perfect Storm"? Racial Resegregation, High Stakes Testing, and School Resource Inequities: The Case of North Carolina*, 81 N.C. L. REV. 1375, 1410-11 (2003).

233. *Id.* at 1415.

234. *Id.*

235. See Reyes, *supra* note 3, at 556.

disruptive or “bad” students away from the mainstream crowd. Rather, if AEPs are to function at all, they must do so with an eye toward academic and social equity, not only within the sphere of alternative schools, but also in the greater sphere of public schools in general.²³⁶

To relieve the very need for AEPs school administrators should document and track disciplinary referral trends among teachers working at their schools in order to identify causes precipitating exclusion. Once such causes are identified, administrators can attack the heart of the problem through any number of interventions.

As discussed earlier, there is evidence that the disparate representation of African Americans and Latinos in AEPs is, in part, attributable to poor class management skills and cultural ignorance exhibited by novice teachers. Indeed, it appears that culturally ignorant assumptions may work the greatest harm upon poor and minority student populations. In one study, for example, “teachers in middle-class, predominantly white schools viewed student inattention as an indication that the teacher needed to do more to gain the student’s interest.”²³⁷ Conversely, teachers in lower class, predominantly black schools attributed student inattention to the students’ inability to concentrate.²³⁸ These findings exemplify the harm arising from false assumptions and illustrate the notion that fiction that is perceived as real *is real* in its consequences.

In any event, in light of the current state of affairs, the need for meaningful and effective teacher training to improve classroom management and to enhance cultural awareness is obvious. Such training will undoubtedly go a long way toward reversing the trend of excluding poor minority students from the rest of the student population based on their misconduct and will help to facilitate the type integration envisioned by the *Brown* Court.

It is this vision that should drive the efforts of school officials to create and sustain genuine academic and social equity in the nation’s schools. It is this vision that should guide the legal analysis of controversies stemming from the development and implementation of AEPs across the country. It is this vision that cannot be forgotten.

236. See Wren, *supra* note 3, at 353.

237. Reed, *supra* note 15, at 608.

238. *Id.*

THE ROLE OF LACHES IN CLOSING THE DOOR ON COPYRIGHT INFRINGEMENT CLAIMS

DYLAN RUGA^{*}

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I. INTRODUCTION

Copyright owners are given exclusive rights to their original work.¹ These rights mean nothing, however, if the copyright owner cannot enforce them by suing an infringer. Accordingly, Congress has determined that the owner of exclusive rights has three years in which to bring an action for infringement.² But what if the copyright owner, aware of the infringement, remains silent and waits to see how successful the infringer's work is before bringing his claim? Should the equitable doctrine of laches preclude such a claim in order to protect a prejudiced defendant, even if ultimately the claim is brought within the statutory period?

The Ninth Circuit Court of Appeals, in *Danjaq LLC v. Sony Corporation*,³ has answered in the affirmative, holding that some copyright owners have less than three years to bring their infringement claim. In *Danjaq*, the court, concerned more with the prejudice caused to the defendant than the rights of the plaintiff, disregarded the applicable three-year statute of limitations established by Congress and instead held that laches is available as a defense even to a statutorily timely claim.⁴

The Fourth Circuit, the only other circuit to confront the issue, reached the opposite result and rejected the idea that laches can be used as a defense to an infringement claim brought within the statutory period.⁵ In *Lyons Partnership*, the court held that laches was not available because it is an equitable doctrine that is inapplicable to an action at law, and its use would violate the doctrine of separation of powers since Congress already has established the limitations period.⁶

The circuit courts' wholesale acceptance or rejection of laches as a defense to timely infringement actions fails to distinguish between the legal and equitable claims available within the copyright context.⁷ This paper will analyze the nature of each of the Copyright Act's remedies under the United States Supreme Court's analysis established in *Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*,⁸ and will conclude that laches only should preclude equitable remedies. This approach results in the fairest adjudication of copyright infringement claims because a prejudiced defendant escapes

1. 17 U.S.C. § 106 (2000).

2. 17 U.S.C. § 507(b) (2000).

3. 263 F.3d 942, 954 (9th Cir. 2001).

4. *Id.* at 954–55.

5. *Lyons P'ship v. Morris Costumes, Inc.*, 243 F.3d 789, 797 (4th Cir. 2001).

6. *Id.*

7. *See generally id.*

8. 494 U.S. 558 (1989).

some liability, but the plaintiff retains the right to recourse through available legal claims. This is a rational result because, while the plaintiff has delayed in bringing his claim, it nevertheless was filed within the limitations period.

Part I of this paper examines the defense of laches and its elements. Part II explores the current circuit split created by the Fourth and Ninth Circuits and demonstrates how both courts took an all-or-nothing approach to laches within the copyright context, either accepting or rejecting it wholesale. Part III takes a brief look at the history of law and equity in the United States and explains that the United States Supreme Court traditionally has permitted equitable defenses to defeat equitable, but not legal, claims. Finally, Part IV analyzes each of the remedies under the Copyright Act, characterizes them either as legal or equitable, and concludes that laches should preclude only the latter claims.

II. THE EQUITABLE DEFENSE OF LACHES

A. *Lack of Diligence by Plaintiff*

To successfully assert a laches defense, a defendant must first demonstrate that the plaintiff remained silent after learning that his legal rights had been violated.⁹ Courts often divide this prong into two separate inquiries: 1) whether there was a delay; and 2) whether the delay was unreasonable.¹⁰

Whether the plaintiff has delayed in filing his claim depends on when the “clock” began to run.¹¹ Unlike the statute of limitations, which precludes claims filed three years after the infringement occurs,¹² the clock begins to run for purposes of laches when the plaintiff knew or should have known about the claim.¹³ Accordingly, if a plaintiff could not have known about a claim until after the statutory period, the claim may be barred by the statute of limitations but permitted by laches.¹⁴ Conversely, a plaintiff may be barred by laches but not by the statute of limitations if he was aware of, or should have been aware of, an impending infringement.¹⁵ The United States Supreme Court has explained that this discrepancy between laches and the statute of limitations is because:

9. See *Danjaq*, 263 F.3d at 952–55.

10. *Id.*; 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12.06 (2004) [hereinafter NIMMER I].

11. See *Danjaq*, 263 F.3d at 952.

12. NIMMER I, *supra* note 10, §12.05[A].

13. *Kling v. Hallmark Cards, Inc.*, 225 F.3d 1030, 1036 (9th Cir. 2000).

14. *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946).

15. *Kling*, 225 F.3d at 1038.

[e]quity eschews mechanical rules; it depends on flexibility. Equity has acted on the principal that “laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties.”¹⁶

Whether a particular delay is reasonable depends on its cause.¹⁷ Courts have determined, for example, that a delay was reasonable where it was necessary to: exhaust administrative remedies; evaluate and prepare a complicated claim; and determine whether the cost of litigation was justified by the infringement.¹⁸ On the other hand, delay is unreasonable if its “purpose is to capitalize on the value of the alleged infringer’s labor, by determining whether the infringing conduct will be profitable.”¹⁹ Indeed, as Judge Learned Hand explained in one of the most oft-cited copyright passages:

[i]t must be obvious to every one familiar with equitable principles that it is inequitable for the owner of a copyright, with full notice of an intended infringement, to stand inactive while the proposed infringer spends large sums of money in its exploitation, and to intervene only when his speculation has proved a success. Delay under such circumstances allows the owner to speculate without risk with the other’s money; he cannot possibly lose, and he may win.²⁰

*Hayward v. National Bank*²¹ provides a pertinent example of unreasonable delay.²² In that case, the United States Supreme Court relied on laches to reject the appellant’s argument that his bank should not have foreclosed on stock that appellant had used as collateral to secure a loan.²³ Before foreclosing, the appellant waited until the stock’s value had risen substantially.²⁴ Justice Harlan, after considering the appellant’s lack of diligence, concluded that laches applied, and that the claim could not stand because the appellant

16. *Holmberg*, 327 U.S. at 396 (quoting *Gallihier v. Cadwell*, 145 U.S. 368, 373 (1891)); see *S. Pac. Co. v. Bogert*, 250 U.S. 483, 488–89 (1919).

17. *Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 954 (9th Cir. 2001).

18. *Id.*

19. *Id.* (citing *Haas v. Leo Feist, Inc.*, 234 F. 105, 108 (S.D.N.Y. 1916)).

20. *Haas*, 234 F. at 108.

21. 96 U.S. 611 (1877).

22. *Id.* at 617–18.

23. *Id.*

24. *Id.* at 615–17.

“remained silent when he should have spoken. He will not be heard now, when he should be silent.”²⁵

B. *Prejudice to Defendant*

Unreasonable delay is not enough to preclude a claim on the basis of laches; the defendant also must have been prejudiced by the delay.²⁶ There are two main forms of prejudice: evidentiary and expectations-based.²⁷ The former is concerned with “such things as lost, stale, or degraded evidence, or witnesses whose memories have faded or who have died.”²⁸ On the other hand, a defendant may demonstrate the latter by showing that he acted in certain ways based on the assumption that he would not be sued, and that he would have acted differently if the plaintiff had filed the claim promptly.²⁹

III. CIRCUIT SPLIT

A. *Ninth Circuit*

In *Danjaq LLC v. Sony Corp.*, Danjaq argued that it had been transferred the rights to the James Bond films by Ian Fleming, who created the James Bond character.³⁰ The appellant, McClory, however, contended that he owned rights to the films because he adapted Fleming’s unmemorable Bond for the screen, and through his own creativity, had established the recognizable movie character that ultimately became successful.³¹

Fleming had discussions with McClory about creating a James Bond movie in the late 1950s and worked with him to create a screenplay based on his unwritten but upcoming novel titled *Thunderball*.³² McClory argued that the Bond character developed for the *Thunderball* screenplay differed from Fleming’s earlier descriptions.³³ Fleming subsequently wrote the *Thunderball* novel and took credit as the sole author, without mentioning McClory.³⁴ Danjaq, also looking to make James Bond films, in 1961 commissioned a

25. *Id.* at 617.

26. *Danjaq*, 263 F.3d at 955.

27. *Id.*; NIMMER I, *supra* note 10, §12.06[B][3].

28. *Danjaq*, 263 F.3d at 955.

29. *Id.*

30. *Id.* at 947.

31. *Id.*

32. *Id.* at 948.

33. *Danjaq*, 263 F.3d at 948.

34. *Id.*

writer to write the Thunderball screenplay.³⁵ Danjaq eventually released numerous Bond films, all of which, McClory argued, infringed his original description of Bond in the Thunderball screenplay he had created.³⁶

Danjaq filed suit in 1998, and McClory responded with counterclaims.³⁷ The parties settled all issues before trial except for the issue of Danjaq's alleged infringement of McClory's cinematic Bond, for which McClory sought damages and Danjaq's profits.³⁸ Danjaq responded that McClory's infringement claim was barred by laches.³⁹

1. Delay

The court held that McClory unreasonably delayed in filing his claim.⁴⁰ The time between when McClory should have known of his claims (i.e., when the films were released) and when he brought suit ranged from nineteen to thirty-six years, a length of time that the court determined "[b]y any metric . . . is more than enough."⁴¹ This delay was unreasonable because McClory had no justification for his tardiness.⁴² "This is not a case," the court noted, "of secret computer code, but of eighteen publicly-released, widely-distributed movies"⁴³

McClory also argued that the recent re-release of James Bond films on DVD infringed his copyright and should not be barred by laches.⁴⁴ The court rejected this claim, however, and noted that "[w]here, as here, the allegedly infringing aspect of the DVD is identical to the alleged infringements contained in the underlying movie, then the two should be treated identically for purposes of laches."⁴⁵ Thus, by precluding McClory's claim based on the infringing DVDs, the court made clear that laches sometimes may bar a claim filed within the statutory period.⁴⁶

35. *Id.*

36. *Id.* at 948–50.

37. *Id.* at 949.

38. *Danjaq*, 263 F.3d at 949.

39. *Id.* at 950.

40. *Id.* at 952–53.

41. *Id.* at 952.

42. *Id.* at 954.

43. *Danjaq*, 263 F.3d at 954.

44. *Id.* at 953.

45. *Id.*

46. *Id.* at 954. The Ninth Circuit recently held that a plaintiff, who brings his claim within three years of the time that he knew or should have known of the infringement, is not precluded from recovering damages outside of the three-year statutory window. *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 705–06 (9th Cir. 2004). This situation is similar to,

2. Prejudice

The Ninth Circuit determined that *Danjaq* established both evidentiary and expectations-based prejudice.⁴⁷ The former was satisfied because many of the people involved in the creation of the Bond films had died and many of the relevant records were missing.⁴⁸ *Danjaq* demonstrated the latter by showing that it had invested roughly one billion dollars in the Bond films, which presumably it would not have done if McClory had brought his claim sooner.⁴⁹

B. Fourth Circuit

As opposed to the Ninth Circuit's holding, the Fourth Circuit, in *Lyons Partnership v. Morris Costumes, Inc.*,⁵⁰ held that laches *never* can bar a statutorily timely claim.⁵¹ The plaintiff in *Lyons* owned the copyright to Barney (the purple dinosaur) and sought, through its claim for injunctive relief and damages, to prevent the defendant from marketing look-alike costumes of the "well-stuffed Tyrannosaurus."⁵²

The district court found that the defendant had infringed the plaintiff's copyright in Barney; however, it held that—even though some infringement occurred within the limitations period—all of the claims were barred by the statute of limitations and laches because the plaintiff knew of the infringements more than four years before bringing suit.⁵³ The Fourth Circuit disagreed and held that, where there is an express statute of limitations, the separation of powers would be offended if laches, a judicially-created timeliness rule, barred claims brought within the statutory period.⁵⁴

The *Lyons* court rejected wholesale the idea that laches can bar a timely copyright infringement claim.⁵⁵ Indeed, the court stated that "when Congress creates a cause of action and provides both legal and equitable remedies, its

but different from, the facts of *Danjaq*, where the plaintiff brought his claim more than three years after he should have known of the alleged infringement. *Danjaq*, 384 F.3d at 953.

47. *Danjaq*, 263 F.3d at 955.

48. *Id.* at 955–56.

49. *Id.* at 956.

50. 243 F.3d 789 (4th Cir. 2001).

51. *Id.* at 798. "[W]hen considering the timeliness of a cause of action brought pursuant to a statute for which Congress has provided a limitations period, a court should not apply laches to overrule the legislature's judgment as to the appropriate time limit to apply for actions brought under the statute." *Id.*

52. *Id.* at 794–95.

53. *Id.* at 796–97.

54. *Lyons P'ship*, 243 F.3d at 797.

55. *Id.* at 798.

statute of limitations for that cause of action should govern, regardless of the remedy sought.”⁵⁶ Therefore, under *Lyons*, laches never is available as a defense to preclude timely infringement claims—equitable or legal—because Congress has created an express statute of limitations.⁵⁷

IV. HISTORY OF LAW AND EQUITY

Although the United States Supreme Court has never specifically addressed whether laches is available as a defense to copyright infringement actions, it has confronted the issue of whether laches can defeat certain other legal and equitable claims where a federal statute of limitations exists.⁵⁸ To understand the implications of the Court’s holdings more completely, however, it is necessary to digress briefly into the history of law and equity in the United States.

Simply stated, the distinction between legal and equitable claims is based on the remedies available to the plaintiff.⁵⁹ A plaintiff seeking equitable relief usually is asking the court to order the *defendant* to do or not do something.⁶⁰ On the other hand, legal relief usually is an order by the court stating that the *plaintiff* is entitled to something, such as monetary damages.⁶¹ The distinction between legal and equitable claims is critical because only plaintiffs who assert the former are guaranteed a jury trial by the Seventh Amendment.⁶²

The division of law and equity courts began in England during the thirteenth and fourteenth centuries.⁶³ As the law courts increasingly became less willing to grant equitable relief, plaintiffs began to seek redress by taking their cases directly to the King.⁶⁴ The King in turn directed plaintiffs to the chancellor,⁶⁵ who was next in line after the King as the most powerful governmental officer and to whom many looked as the “government’s leading

56. *Id.*

57. *Id.*

58. See, e.g., *United States v. Mack*, 295 U.S. 480, 489 (1935) (finding “[l]aches within the term of the statute of limitations is no defense at law”); *Gardner v. Panama R.R.*, 342 U.S. 29, 31 (1951). Laches “should not be determined merely by a reference to and a mechanical application of the statute of limitations. The equities of the parties must be considered as well.” *Gardner*, 342 U.S. at 31.

59. ROBERT N. LEAVELL ET AL., *EQUITABLE REMEDIES, RESTITUTION AND DAMAGES* 1 (6th ed. 2000).

60. *Id.*

61. *Id.*

62. *Id.* at 12.

63. *Id.* at 3.

64. LEAVELL ET AL., *supra* note 59, at 3–4.

65. *Id.* at 3–4.

moral authority.”⁶⁶ Accordingly, equitable claims began to be heard in Chancery (the chancellor’s court) and were resolved with flexibility, based on notions of fairness rather than the rigidity that characterized law courts.⁶⁷

The American colonies adopted the English bifurcated court system; however, by the eighteenth century there was a movement to merge law and equity for procedural purposes,⁶⁸ because Americans were skeptical of equity’s shortcomings.⁶⁹ For example, Americans complained that equity courts did not have jury trials, colonial governors abused their powers as chancellors, and the equity court system was too similar to the royalist English Court of Chancery.⁷⁰

The merger of law and equity was accomplished primarily as a result of the *Federal Rules of Civil Procedure*,⁷¹ which, as adopted in 1938, state that “[t]here shall be one form of action to be known as ‘civil action.’”⁷² Since then, the United States Supreme Court has grappled with the role of legal defenses to equitable claims and visa-versa. While some confusion still remains, the Court has settled many of these issues definitively. For example, the Court consistently has permitted *equitable* defenses to defeat *equitable* claims brought within the applicable statute of limitations.⁷³ Illustratively, in *Holmberg v. Armbrrecht*,⁷⁴ the Court stated that “[a] suit in equity may fail though ‘not barred by the act of limitations’” because “[e]quity eschews mechanical rules; it depends on flexibility.”⁷⁵

What about *equitable* defenses to *legal* claims? In 1985, many years after the merger of law and equity, the United States Supreme Court affirmatively rejected the idea, declaring “that application of the equitable defense of laches in an action at law would be novel indeed.”⁷⁶

Thus, it is clear that laches, an equitable defense, can defeat equitable—but not legal—claims.⁷⁷ In the copyright context, where both legal and equitable remedies are available, it is not enough to wholly accept or reject la-

66. *Id.* at 4.

67. *See* Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982).

68. LEAVELL ET AL., *supra* note 59, at 7.

69. *See id.* at 7–9.

70. *Id.* at 9.

71. *City of Morgantown v. Royal Ins. Co.*, 337 U.S. 254, 257 (1949).

72. FED. R. CIV. P. 2.

73. *See, e.g.*, *Russell v. Todd*, 309 U.S. 280 (1940).

74. 327 U.S. 392 (1946).

75. *Id.* at 396 (quoting *McKnight v. Taylor*, 42 U.S. 161, 162 (1843)).

76. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 244 n.16 (1985). *See also id.* at 261–62 (Stevens, J. dissenting) (claiming “the application of a traditional equitable defense in an action at law is something of a novelty”).

77. *Id.* at 244–45; *Holmberg*, 327 U.S. at 396.

ches. Instead, it is necessary to parse out the remedies and permit laches to prevent equitable, but not legal, claims. The next section of this article attempts to do just that by analyzing each copyright remedy under the Supreme Court's two-prong test, established in *Terry*, to determine its legal or equitable nature.

V. SEPARATING LEGAL VS. EQUITABLE COPYRIGHT CLAIMS

It is easy enough to conclude that laches can bar copyright infringement actions where equitable, but not legal, relief is sought. What is more difficult, however, is determining which of the Copyright Act's remedies are legal and which are equitable. As Justice Brennan observed, "[t]he fact is . . . that there are, for the most part, no such things as inherently 'legal issues' or inherently 'equitable issues.' There are only factual issues, and, 'like chameleons [they] take their color from surrounding circumstances.'"⁷⁸

Chapter 5 of the Copyright Act contains the remedies available in a copyright infringement action. The available remedies include injunctions,⁷⁹ impounding and disposal of infringing articles,⁸⁰ actual damages and profits or statutory damages,⁸¹ costs and attorney's fees,⁸² and seizure and forfeiture of infringing articles to the United States.⁸³

Although tempting, it is not enough simply to apply "the 'general rule' that monetary relief is legal."⁸⁴ Instead, each remedy must be considered in light of the United State Supreme Court's two-prong test established in *Terry* for determining whether it is legal or equitable, which includes an examination of (1) "the nature of the issues involved," and (2) "the remedy sought."⁸⁵ The prongs are not weighted equally—the second is more important.⁸⁶

A. *Section 502: Injunctions*

Under section 502(a) of the Copyright Act, a court "may . . . grant temporary and final injunctions . . . to prevent or restrain infringement of a copy-

78. *Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*, 494 U.S. 558, 577 (1990) (Brennan, J., concurring) (quoting *Ross v. Bernhard*, 396 U.S. 531, 550 (1970)).

79. 17 U.S.C. § 502 (2000).

80. § 503.

81. § 504.

82. § 505.

83. § 509.

84. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 352 (1998).

85. *Terry*, 494 U.S. at 565.

86. *Id.*

right.”⁸⁷ As Justice Story explained, injunctions are necessary in the copyright context because

[i]t is quite plain that if no other remedy could be given in cases of patents and copyrights than an action at law for damages, the inventor or author might be ruined by the necessity of perpetual litigation, without ever being able to have a final establishment of his rights.⁸⁸

Injunctions are the quintessential form of equitable relief,⁸⁹ and have been recognized as such in the copyright context.⁹⁰ Accordingly, no *Terry* analysis is necessary since it is clear that injunctions constitute equitable relief.⁹¹

B. Section 503: Impoundment / Destruction of Infringing Articles

Section 503 gives the court discretion⁹² to impound or destroy infringing articles.⁹³ Courts, recognizing the similarity to injunctive relief, have concluded that the impoundment and/or destruction of infringing articles is an equitable remedy.⁹⁴ Indeed, some courts have required the plaintiff to

87. § 502(a).

88. 2 JOSEPH STORY, LL.D., COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA 236 (Melville M. Bigelow, Ph. D. ed., 13th ed. 1988).

89. “Of the various coercive equitable remedies, none is as useful and effective as the injunction . . . [which] is perhaps the most widely requested equitable relief.” EDWARD D. RE & JOSEPH R. RE, REMEDIES CASES AND MATERIALS 253 (5th ed. 2000) (emphasis omitted).

90. See, e.g., *Hayden v. Chalfant Press, Inc.*, 177 F. Supp. 303, 307 (S.D. Cal. 1959); 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 14.06[A], at 14–117 (2004) [hereinafter NIMMER II] (Given their antecedents in equity, preliminary injunctions are sometimes reflexively labeled an “extraordinary remedy.”).

91. Similarly, § 509 of the Copyright Act, which permits a court to order seizure and forfeiture of infringing articles to the United States, clearly is equitable and thus does not require analysis under *Terry*. See 17 U.S.C. § 509(a) (2000).

92. The wording of the statute is permissive, stating that the court “may order” the impoundment or destruction. 17 U.S.C. § 503(a)-(b) (emphasis added); see also NIMMER II, *supra* note 90, § 14.07[A].

93. § 503.

94. See, e.g., *CSC Holdings, Inc. v. Greenleaf Elecs., Inc.*, No. 99-C7249, 2000 U.S. Dist. LEXIS 7675, at *29–30 (N.D. Ill. June 1, 2000) (seeking equitable relief which included “impoundment and destruction of existing illegal decoders”); *Devils Films, Inc. v. Nectar Video*, 29 F. Supp. 2d 174, 175 (S.D.N.Y. 1998) (referring to the court’s “equitable powers” in deciding whether to seize defendant’s allegedly infringing articles); *WPOW, Inc. v. MRLJ Enters.*, 584 F. Supp. 132, 135 (D.C. Cir. 1984) (characterizing impoundments as “injunctive in character”).

satisfy the requirements for injunctive relief before issuing an order for impoundment.⁹⁵

For example, in *WPOW, Inc. v. MRLJ Enterprises*, the plaintiff alleged that the defendant infringed its copyright when the defendant submitted an application to the Federal Communications Commission to erect new radio broadcasting facilities.⁹⁶ The plaintiff asked the court to impound all of defendant's infringing material, including the application.⁹⁷ The court characterized an order for impoundment as "injunctive in character"⁹⁸ and required the plaintiff to demonstrate that he was entitled to injunctive relief before it ordered the impoundment of the defendant's infringing articles.⁹⁹

The discretion given to the courts by the statute and the similarity to injunctive relief compels the conclusion that an order for impoundment and/or destruction of infringing material is equitable in nature.

C. *Section 504: Actual Damages and Profits or Statutory Damages*

The remedy available under section 504 is disjunctive. The plaintiff can elect to take either actual damages and profits *or* statutory damages, but not both.¹⁰⁰ This choice makes it difficult to classify the remedy as either legal or equitable. Although it may be true that copyright claims for actual and statutory damages generally were tried in courts of law in front of juries (and thus are legal in nature),¹⁰¹ a *Terry* analysis of an action for the infringer's profits leads to the conclusion that that remedy is equitable in nature.¹⁰²

95. See *WPOW, Inc.*, 584 F. Supp. at 135; *Martin Luther King, Jr. Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 508 F. Supp. 854, 861 (N.D. Ga. 1981).

96. *WPOW, Inc.*, 584 F. Supp. at 133.

97. *Id.*

98. *Id.* at 135.

99. *Id.* at 139 (holding that "[s]ince the plaintiff has met the standard for the grant of a preliminary injunction, the Court will issue an order for the impoundment of all of defendants' materials which infringe plaintiff's engineering report and antenna design").

100. 17 U.S.C. § 504(a) (2000).

101. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 348 (1998).

102. In *Terry*, the Court characterized the damages as legal because the respondent did not contain attributes which would create an exception to the general rule. *Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*, 494 U.S. 558, 570-71 (1990). However, the Court "characterized damages as equitable where they are restitutionary, such as in 'action[s] for disgorgement of improper profits.'" *Id.*

1. Section 504(b): Actual Damages and Profits

If a plaintiff were entitled merely to actual damages, it would be clear that he would be seeking legal relief.¹⁰³ Under section 504, however, a plaintiff is entitled to actual damages *and* the defendant's profits.¹⁰⁴ It is unclear whether recovery of the defendant's profits is a legal or equitable remedy; the United States Supreme Court has never confronted the issue directly, but in dicta outside the copyright context has stated that it is equitable and—inconsistently—later stated that it is legal.¹⁰⁵ The determination of whether an action for the defendant's profits is legal or equitable thus requires an application of the Court's two-prong test set forth in *Terry*.¹⁰⁶

a. Chauffeurs v. Terry

In *Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*, decided in 1990, the plaintiffs sought a jury trial on the issue of whether they were owed backpay for “a union's alleged breach of its duty of fair representation.”¹⁰⁷ The Court recognized that a jury trial is required under the Seventh Amendment where legal rights are at stake,¹⁰⁸ and ultimately held that the plaintiffs' action for backpay was legal in nature.¹⁰⁹

In reaching its conclusion, however, the Court noted that it never has held that “any award of monetary relief must necessarily be ‘legal’ relief.”¹¹⁰ Instead, the Court explained that it will characterize remedies “as equitable where they are restitutionary, such as in ‘action[s] for disgorgement of improper profits.’”¹¹¹ Thus, it follows that, under *Terry*, a copyright infringement action that seeks disgorgement of the defendant's profits under Section 504(b) is an equitable remedy.¹¹²

103. *Curtis v. Loether*, 415 U.S. 189, 196 (1974); NIMMER I, *supra* note 10, § 12.10[A], at 12–178 (stating that “it is beyond dispute that a plaintiff who seeks to recover actual damages is entitled to a jury trial”).

104. 17 U.S.C. § 504(b) (2000). Although the plaintiff is entitled to recover the defendant's profits, they are recoverable “only if, and to the extent that, such profits have not already been ‘taken into account in computing the actual damages.’” NIMMER II, *supra* note 91, § 14.01[A], at 14–5 (quoting § 504(b)).

105. *See Terry*, 494 U.S. at 570–71.

106. *See id.* at 565.

107. *Id.* at 561.

108. *Id.* at 564–65.

109. *Id.* at 573.

110. *Terry*, 494 U.S. at 570 (quoting *Tull v. United States*, 481 U.S. 412, 424 (1987)).

111. *Id.*

112. *Id.* at 570–71.

b. *Feltner v. Columbia Pictures*

Eight years after *Terry*, the Court decided *Feltner v. Columbia Pictures Television, Inc.*¹¹³ In *Feltner*, the plaintiff argued that the defendant had infringed its copyright by televising certain shows without authorization.¹¹⁴ The plaintiff chose to receive statutory damages under section 504(c), and the question for the Supreme Court was whether the plaintiff should be entitled to a jury trial.¹¹⁵ The Court was unable to “discern ‘any congressional intent to grant . . . the right to a jury trial,’”¹¹⁶ so it engaged in constitutional analysis and ultimately concluded that the Seventh Amendment requires “a jury trial on all issues pertinent to an award of statutory damages.”¹¹⁷

Prior to engaging in its constitutional analysis, however, the *Feltner* court examined the language of section 504(c) that permits an award of statutory damages to be made “in an amount that ‘the court considers just.’”¹¹⁸ It determined that the word “court” meant judge, not jury, and thus implied that no trial was necessary to determine statutory damages.¹¹⁹ In reaching this conclusion, the Court compared the language of section 504(c) to section 504(b)—awards of actual damages and profits—which it stated “generally are thought to constitute legal relief.”¹²⁰

The Court’s dicta in *Feltner* that actual damages and profits constitute legal relief contradicts its statement in *Terry* and thus deserves further consideration.¹²¹ The statement was supported by three cases and the Nimmer treatise, none of which stands directly for the proposition asserted.¹²² Indeed, none of the authorities relied on by the Court distinguishes between actions for actual damages and actions for the infringer’s profits, and only one of the three cases involved a copyright dispute.¹²³ Accordingly, there is no reason to believe that this issue was considered by any of the sources on which the Court relied.

113. 523 U.S. 340 (1998).

114. *Id.* at 342–43.

115. *Id.* at 342.

116. *Id.* at 345 (quoting *Tull*, 481 U.S. at 417 n.3 (1987)).

117. *Id.* at 355.

118. *Feltner*, 523 U.S. at 345 (quoting 17 U.S.C. § 504(c)(1)).

119. *Id.* at 346 (contrasting the Copyright Act which “does not use the term ‘court’ in the subsection addressing awards of actual damages and profits . . . which generally are thought to constitute legal relief”).

120. *Id.*

121. *Id.*

122. *See id.*

123. *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962); *Video Views, Inc. v. Studio 21, Ltd.*, 925 F.2d 1010 (7th Cir. 1991); *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946); NIMMER I, *supra* note 10, § 12.10[B].

The first case cited by the Court, *Dairy Queen, Inc. v. Wood*, concerned a trademark infringement.¹²⁴ The Court in *Dairy Queen* held that “an action for damages based upon a charge of trademark infringement . . . [is] subject to cognizance by a court of law.”¹²⁵

Dairy Queen does not necessarily support the conclusion in *Feltner* that an action for the defendant’s profits under the Copyright Act is legal in nature. Besides the obvious observation that *Dairy Queen* interpreted the Lanham Act and not the Copyright Act, the statement in *Dairy Queen* is not limited solely to the defendant’s profits—it speaks to “an action for damages”¹²⁶ based on trademark infringement, which can include lost profits, actual damages, an accounting of the infringer’s profits, attorneys’ fees, and/or the costs of the action.¹²⁷ Thus, it is impossible to conclude whether the *Dairy Queen* Court even considered the narrower issue of whether an action for the infringer’s profits was legal in nature, or whether the court merely made a general statement without considering the different damages available for a trademark infringement.

For similar reasons, the second case cited in *Feltner*, *Arnstein v. Porter*,¹²⁸ also is inapposite. In that case, the plaintiff brought a copyright infringement action seeking “damages” and a jury trial.¹²⁹ The defendant argued that a jury trial was inappropriate; the court disagreed and, analogizing the claim to one brought under the 1890 Sherman Act, held that “an action for treble damages . . . is triable at ‘law’ and by a jury as of right.”¹³⁰ As is the case in *Dairy Queen*, it is unclear what type of damages were at issue in *Arnstein*, and thus it is impossible to determine whether the plaintiff was seeking the defendant’s profits.¹³¹ Moreover, *Arnstein*’s analogy to the Sherman Act may be instructive as to whether claims for actual damages are triable by jury, but sheds no light on whether a claim for the defendant’s profits is equitable or legal in nature.¹³²

124. *Dairy Queen*, 369 U.S. at 469.

125. *Id.* at 477.

126. *Id.*

127. 15 U.S.C. § 1117 (2000).

128. *Arnstein*, 154 F.2d at 464.

129. *Id.* at 467. It is unclear what type of damages the plaintiff sought to recover. *Id.*

130. *Id.* at 468. *Arnstein* interpreted the Sherman Act of 1890 which provides that “[a]ny person who shall be injured . . . by reason of anything forbidden or declared to be unlawful by this act, may sue therefor . . . and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney’s fee.” Sherman Act of 1890, ch. 647, § 7, 26 Stat. 210 (1890).

131. *Arnstein*, 154 F.2d at 464.

132. *Id.*

The final case cited in *Feltner* to support the conclusion that an action for the defendant's profits is legal in nature is *Video Views, Inc. v. Studio 21, Ltd.*¹³³ Like the other two cases, the Court's reliance on *Video Views* is misplaced. *Video Views* states "that the right to a jury trial exists in a copyright infringement action when the copyright owner endeavors to prove and recover its actual damages"¹³⁴ *Video Views* says nothing about an action for the defendant's profits; indeed, it emphasized that the court was concerned only with actual damages.¹³⁵

In addition to the three cases discussed above, the *Feltner* court relied on a statement in the Nimmer treatise that "it is beyond dispute that a plaintiff who seeks to recover actual damages is entitled to a jury trial."¹³⁶ This statement, like all of the other authorities cited, applies only to actual damages and does not address the nature of an action for the defendant's profits.¹³⁷

Thus, it is clear that the Court's dicta in *Feltner* contradicted its statement in *Terry*, but was unsupported by the authority it relied upon. An unsupported assertion, however, is not necessarily inaccurate. In light of the Court's inconsistency regarding the nature of claims for an infringer's profits, it is necessary to apply *Terry*'s two-prong test to characterize the remedy as either legal or equitable in nature.

c. *Terry Prong 1: The Nature of the Issues Involved*

The first prong in the Court's analysis to determine the nature of an action is to "compare the statutory action to 18th-century actions brought in the courts of England prior to the merger . . . of law and equity."¹³⁸ In *Feltner*, the Court reviewed the history of copyright infringement actions in this country.¹³⁹ It noted that prior to the ratification of the Seventh Amendment, in both America and England, copyright infringement suits that sought "monetary damages were tried in courts of law, and thus before juries."¹⁴⁰ While this may be accurate, the Copyright Acts of 1790¹⁴¹ and 1831¹⁴² do not

133. *Video Views*, 925 F.2d at 1010.

134. *Id.* at 1014 (citing *Armstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946)).

135. *See id.*

136. NIMMER I, *supra* note 10, § 12.10[A].

137. *See id.*

138. *Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990).

139. *See Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998).

140. *Id.* at 348-49.

141. Copyright Act of 1790, ch. XV, 71 Stat. 124 (1790).

142. Copyright Act of 1831, ch. XVI, 4 Stat. 436 (1831).

specifically provide for recovery of the defendant's profits.¹⁴³ It was not until the Copyright Act of 1909 that a plaintiff was entitled to recover "all the profits which the infringer shall have made from such infringement."¹⁴⁴ Thus, the observation that copyright claims for monetary damages traditionally were tried before juries does not resolve whether a claim for an infringer's profits was considered legal or equitable in England during the eighteenth century.

d. *Terry Prong 2: The Remedy Sought*

The second prong of the Court's analysis looks at the nature of the remedy sought.¹⁴⁵ This prong is more important than the first¹⁴⁶ and "should not replicate the 'abstruse historical' inquiry of the first part."¹⁴⁷

In *Terry*, the Court explained that while an action for monetary damages was "'the traditional form of relief offered in the courts of law,'"¹⁴⁸ damages will be characterized as equitable if they are restitutionary.¹⁴⁹ The goal of restitution is to prevent "the unjust enrichment of one person at the expense of another."¹⁵⁰ Put differently, restitution is limited to "restoring the status quo and ordering the return of that which rightfully belongs to the [plaintiff]."¹⁵¹ An action to recover an infringer's profits thus clearly is restitutionary because the defendant merely returns profits that rightfully belong to the plaintiff, and it follows that such an action should be characterized as equitable in nature.¹⁵²

143. Both Acts allowed the plaintiff to recover "all damages occasioned by such injury," but neither Act specifically made available the infringer's profits. See § 6, 1 Stat. at 124; § 9, 4 Stat. at 436.

144. Copyright Act of 1909, ch. 320, § 25, 35 Stat. 1075, 1081 (1909).

145. *Terry*, 494 U.S. at 565.

146. *Id.*

147. *Id.* at 571 n.8.

148. *Id.* at 570 (quoting *Curtis v. Loether*, 415 U.S. 189, 196 (1974)).

149. *Id.*

150. *BALLENTINE'S LAW DICTIONARY* 1107 (3d ed. 1969).

151. *Tull v. United States*, 481 U.S. 412, 424 (1987) (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 402 (1946)).

152. The equitable character of restitution also is evidenced by the fact that constructive trusts—which clearly are equitable—sometimes are placed on a defendant's profits when restitution is ordered. See *LEAVELL ET AL*, *supra* note 59, at 393 (explaining that "[a] constructive trust is an equitable remedy because it is an *in personam* order from the court to the defendant to convey the defendant's gain to the plaintiff"). Cf., *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 259 (1916) (noting that, in a trademark infringement action, "[t]he infringer is required in equity to account for and yield up his gains to the true owner, upon a principle analogous to that which charges a trustee with the profits acquired by wrongful use of the property of the *cestui que trust*"); *George Basch Co. v. Blue Coral, Inc.*, 968

e. Conclusion

While it is understandable that courts¹⁵³ and commentators¹⁵⁴ have interpreted the Court's dicta in *Feltner* to require a jury trial for a copyright action seeking an infringer's profits, the Court's statement was wholly unsupported by any relevant authority and was inconsistent with its earlier conclusion in *Terry*. Further scrutiny of the remedy under the *Terry* analysis leads to the conclusion that a copyright infringement action seeking an infringer's profits is equitable.¹⁵⁵

Recall that a plaintiff has the right under section 504(b) to recover actual damages and profits.¹⁵⁶ As the foregoing analysis demonstrates, claims of actual damages are legal in nature; however, recovery of the infringer's profits is equitable.¹⁵⁷ Thus, a plaintiff who has unreasonably delayed in bringing his claim and thereby has prejudiced the defendant should be precluded from recovering the defendant's profits, and be limited under section 504(b) to recovering his actual damages.¹⁵⁸ This is a just result since presumably the defendant would not have continued his infringing activity had the plaintiff brought the claim earlier.¹⁵⁹

2. Section 504(c): Statutory Damages

Although lower courts have differed about whether an award of statutory damages is a legal or equitable remedy,¹⁶⁰ the United States Supreme

F.2d 1532, 1538 (2d Cir. 1992) (explaining that "a defendant who is liable in a trademark or trade dress infringement action may be deemed to hold its profits in constructive trust for the injured plaintiff"); RESTATEMENT (FIRST) OF RESTITUTION § 160 (1937).

153. See, e.g., *Chevron U.S.A., Inc. v. El-Khoury*, 2002 U.S. Dist. LEXIS 20400, at *4 (C.D. Cal. Sept. 23, 2002).

154. See, e.g., *NIMMER II*, *supra* note 90, § 14.03[D] ("Particularly after *Feltner v. Columbia Pictures Television, Inc.*, it would seem constitutionally suspect to deny trial by jury on this issue to a party who so requests.").

155. See *Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*, 494 U.S. 558 (1990).

156. 17 U.S.C. § 504(b) (2000).

157. *Terry*, 494 U.S. at 570-73.

158. See *Haas v. Leo Feist, Inc.*, 234 F. 105, 108 (S.D.N.Y. 1916); see *NIMMER I*, *supra* note 10, § 12.06 [A-B].

159. *Haas*, 234 F. at 108.

160. Compare *Chappell & Co. v. Cavalier Cafe, Inc.*, 13 F.R.D. 321, 323 (D. Mass. 1952) (holding that statutory damages are legal) and *Cass County Music Co. v. C.H.L.R., Inc.*, 88 F.3d 635, 643 (8th Cir. 1996) (same), with *Raydiola Music v. Revelation Rob, Inc.*, 729 F. Supp. 369, 376 (D. Del. 1990) (opining that "statutory damages in the copyright infringement context should be characterized as equitable").

Court affirmatively has characterized it as legal.¹⁶¹ Accordingly, no *Terry* analysis is necessary.

In *Feltner*, the Court applied a modified *Terry* analysis and stated that statutory damages are a legal remedy and thus require a jury trial under the Seventh Amendment.¹⁶² Under the first prong of the *Terry* analysis, which considers the historical context of the remedy, the Court observed that “[t]he practice of trying copyright damages actions at law before juries was followed in this country, where statutory copyright protections were enacted even before adoption of the Constitution.”¹⁶³

With respect to the second prong of the *Terry* analysis, the Court noted that “an award of statutory damages may serve purposes traditionally associated with legal relief, such as compensation and punishment.”¹⁶⁴ Accordingly, based on the history of similar claims and on the nature of the remedy sought, the Court characterized statutory damages as legal in nature.¹⁶⁵

D. Section 505: Costs and Attorney’s Fees

Section 505 permits a court, in its discretion, to award costs and attorneys’ fees to the prevailing party in a copyright dispute.¹⁶⁶ Although some courts recently have implied that both awards of costs and attorneys’ fees are equitable in nature,¹⁶⁷ the issue has not been addressed by the United States Supreme Court. It follows that an analysis under *Terry* is required.

The first prong of *Terry*—the nature of the issues involved—favors a conclusion that costs and attorneys’ fees are legal remedies.¹⁶⁸ Although courts in England generally had authority to award costs to prevailing plain-

161. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 352 (1998).

162. *Id.* at 355.

163. *Id.* at 350.

164. *Id.* at 352.

165. *See id.* at 355.

166. 17 U.S.C. § 505; *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994).

167. *See CBS Broad. Inc. v. Primetime 24 Joint Venture*, Copyright L. Dec. (CCH) ¶ 27,883 (S.D. Fla. 1999) (stating that “[a]n award of attorney’s fees is an equitable remedy”). *Cf. Ringling Bros.-Barnum & Bailey, Combined Shows, Inc. v. Utah Div. of Travel Dev.*, 955 F. Supp. 598, 605 (E.D. Va. 1997) (implying that an award of costs is equitable). The court stated that, under the Lanham Act, a trademark owner:

may be entitled, subject to “equitable principles,” to . . . costs . . . the availability of a costs remedy, by itself, provides no basis for a constitutionally mandated jury right. Costs are merely incidental to and intertwined with other available remedies. Thus, where the other available remedies are wholly equitable, costs are also an equitable remedy.

Id.

168. *See Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*, 494 U.S. 558 (1990).

tiffs as early as 1278,¹⁶⁹ such was not the case in this country within the copyright context until the twentieth century. Indeed, the Copyright Act of 1790 was devoid of any provision granting costs or fees to the prevailing party.¹⁷⁰ The Copyright Act of 1831 was the first version that permitted a plaintiff to recover his costs; however, it was stated in mandatory terms, without leaving discretion to the courts.¹⁷¹ It was not until the adoption of the Copyright Act of 1909 that Congress included a provision for both costs and attorneys' fees.¹⁷² The 1909 Act maintained the mandatory award of costs,¹⁷³ but made attorneys' fees permissive.¹⁷⁴ The current iteration of the Copyright Act, adopted in 1976,¹⁷⁵ copied *verbatim* the permissive language relating to attorneys' fees, but changed the language pertaining to costs from mandatory to permissive.¹⁷⁶ In short, an award of costs was not included in the 1790 Act and, once provided for in 1831, was mandatory until the 1976 Act; attorneys' fees, on the other hand, were not available until 1909 and always have been permissive.¹⁷⁷ It follows that the nature of these remedies—as viewed from the first prong of the *Terry* analysis, which considers historical context—are legal because they were unknown within the copyright context until 1831 and were mandatory until 1909.¹⁷⁸

The second and more important prong of the *Terry* analysis, which examines the remedy sought, leads to the opposite conclusion—that an award

169. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 n.18 (1975).

170. See Copyright Act of 1790, ch. XV, § 6, 71 Stat. 124 (1790).

171. See Copyright Act of 1831, ch. XVI, § 12, 4 Stat. 436 (1831) (stating that “in all recoveries under this act, either for damages, forfeitures, or penalties, full costs *shall be* allowed thereon, any thing in any former act to the contrary notwithstanding”) (emphasis added).

172. Copyright Act of 1907, ch. 320, 35 Stat. 1075, 1084 (1909).

173. NIMMER I, *supra* note 10, § 14.09.

174. “[I]n all actions, suits, or proceedings under this Act, except when brought by or against the United States or any officer thereof, full costs *shall be* allowed, and the court *may* award to the prevailing party a reasonable attorney’s fee as part of the costs.” (emphasis added). § 12, 35 Stat. at 1084.

175. 17 U.S.C. § 101 (2000).

176. 17 U.S.C. § 505 (2000) (setting forth “the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof . . . [and] may also award a reasonable attorney’s fee to the prevailing party as part of the costs”); see also *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 523 n.10 (1994).

177. NIMMER II, *supra* note 90, § 14.09.

178. The mandatory nature of costs and attorneys’ fees leads to the conclusion that, historically, these were legal remedies because the court had no discretion in awarding them. See *Raydiola Music v. Revelation Rob, Inc.*, 729 F. Supp. 369, 376 (D. Del. 1990) (noting that discretion given to courts is a “hallmark of equity”).

of costs and attorneys' fees is equitable.¹⁷⁹ Recall that not all monetary awards are legal in nature.¹⁸⁰ To the contrary, the wide discretion given to courts to award costs and attorneys' fees¹⁸¹ compels the conclusion that they are equitable remedies. Granted, these remedies are not easily labeled "restitutionary"¹⁸² because they do not prevent unjust enrichment,¹⁸³ however, they are awards of reimbursement and thus are more restitutionary than compensatory.¹⁸⁴ The equitable nature of the relief does not change merely because it is authorized by statute.¹⁸⁵

Although the first and second prongs of the *Terry* analysis lead to opposite results, the conclusion that costs and attorneys' fees are equitable must follow. The United States Supreme Court has emphasized that the weight given to the second factor is much greater than that given to the first; indeed, the Court itself has rested its conclusion solely on the basis of the second factor when the first factor has left it "in equipoise."¹⁸⁶

E. Summary

Based on the foregoing analysis, the remedies available under the Copyright Act should be characterized as follows:¹⁸⁷

Section	Remedy	Nature
17 U.S.C. § 502	Injunction	Equitable
17 U.S.C. § 503	Impoundment and disposal of infringing articles	Equitable
17 U.S.C. § 504(b)	Actual damages	Legal
	Infringer's profits	Equitable
17 U.S.C. § 504(c)	Statutory damages	Legal

179. See, e.g., Scott J. Jordan, Comment, *Awarding Attorney's Fees to Environmental Plaintiffs Under a Private Attorney General Theory*, 14 B.C. ENVTL. AFF. L. REV. 287, 298 (1987).

180. *Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*, 494 U.S. 558, 570 (1990); *Cont'l Bank, N.A. v. Everett*, 861 F. Supp. 642, 645 (N.D. Ill. 1994); *A.G. Becker-Kipnis & Co. v. Letterman Commodities, Inc.*, 553 F. Supp. 118, 123-24 (N.D. Ill. 1982).

181. *Hall v. Cole*, 412 U.S. 1, 4-5 (1973); *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994); *NIMMER I*, *supra* note 10, §§ 14.09, 14.10.

182. *Terry*, 494 U.S. at 570 (characterizing "damages as equitable where they are restitutionary").

183. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 350 (1998).

184. *A.G. Becker-Kipnis*, 553 F. Supp. at 124.

185. *CBS Broad. Inc. v. Primetime 24 Joint Venture*, Copyright. L. Dec. (CCH) ¶ 27,883 (S.D. Fla. 1999).

186. *Terry*, 494 U.S. at 570, 573-74.

187. 15 U.S.C. §§ 502-505, 509 (2000).

17 U.S.C. § 505	Costs and attorneys' fees	Equitable
17 U.S.C. § 509	Seizure and forfeiture of infringing articles to the United States	Equitable

VI. CONCLUSION

The Fourth and Ninth Circuits have created a circuit split regarding the applicability of laches to a timely copyright infringement action.¹⁸⁸ Surely, since one permitted laches and the other did not, one of the circuits must have gotten it correct.

Not necessarily. This article presents a third alternative: courts should consider the legal or equitable nature of remedies and permit laches to defeat only the latter. This is consistent with precedent¹⁸⁹ and promotes the fairest adjudication of copyright claims by permitting a prejudiced defendant to escape some, but not all, liability.

Although courts of law and equity were separate in the United States for some time, they merged in 1938 as a result of the *Federal Rules of Civil Procedure*.¹⁹⁰ Since that time, the United States Supreme Court has declared that while equitable defenses may preclude equitable claims, their application to legal actions would be "novel indeed."¹⁹¹ Accordingly, laches should apply only to the equitable remedies available under Chapter 5 of the Copyright Act.

In *Terry*, the Supreme Court established the two-prong test for determining the nature of remedies.¹⁹² The first prong considers the historical context of the remedy; the second looks at the nature of the remedy sought to determine its character.¹⁹³ Application of this test to the remedies available for copyright infringement leads to the conclusion that only actual and statutory damages are legal; the remaining remedies are equitable. Accordingly,

188. NIMMER I, *supra* note 10, § 12.06[B][1].

189. See *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 244 n.16 (1985) (stating "that application of the equitable defense of laches in an action at law would be novel indeed"); *White v. Daniel*, 909 F.2d 99, 102 (4th Cir. 1990) (identifying that "[l]aches . . . is properly relevant only where the claims presented may be characterized as equitable, rather than legal"); *Golotrade Shipping and Chartering, Inc. v. Travelers Indem. Co.*, 706 F. Supp. 214, 220 (S.D.N.Y. 1989) (stating that "this is an action at law for damages, therefore, the equitable defense of laches does not apply").

190. FED. R. CIV. P. 2.

191. *Oneida Indian Nation*, 470 U.S. at 245 n.16.

192. *Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990).

193. *Id.*

laches should be cognizable as a bar against all of the plaintiff's remedies except for actual and statutory damages.

As between a plaintiff who unreasonably delayed in filing his claim, and a prejudiced defendant, the latter should receive more protection. The plaintiff is not left without recourse, however, for he can opt under section 504 to recover actual or statutory damages.¹⁹⁴ This result appears not only to be correct, but, well, equitable.

194. An action for the defendant's profits, normally available under section 504 in addition to the plaintiff's actual damages, is an equitable remedy and thus precluded by laches.

BOOK REVIEW

REHABILITATING THOMAS

JUDGING THOMAS: THE LIFE AND TIMES OF CLARENCE THOMAS. By Ken Fosskett. William Morrow. 2004. Pp. xi, 339. \$24.95.

REVIEWED BY JOHN SANCHEZ*

It is remarkable that a sitting fifty-five year old Supreme Court Justice would warrant a full-fledge biography. But when the reader discovers the drama that suffuses Justice Thomas's life, from the hard-scrabble poverty of his early years, the grueling timetable that his grandfather set up for him (accounting for virtually every minute of the day), the lonely years as the only African-American in the seminary, the reader discovers that the mere facts of Thomas's life make for the stuff of fiction.

Ken Fosskett, an investigative reporter for the *Atlanta Journal-Constitution*, seems an unlikely author of Justice Thomas. First of all, Thomas holds a deep-seated distrust of the press. But Mr. Fosskett forged a personal relationship with the Justice in the course of writing a three-part series, the first part is entitled *The Clarence Thomas You Don't Know*, published in the *Atlanta Journal-Constitution* in July 2001.¹ Mr. Fosskett has done his homework; he has interviewed over three hundred people and has read several thousand pages of Thomas's speeches and legal writings. About the only source unavailable to the author were Thomas's private papers.

In earnest praise of Mr. Fosskett's biography, the book's publisher cites a few talking points. Here we have a book that:

chronicles Thomas's contempt for upper-crust blacks who snubbed his uneducated, working-class roots; his flirtation with the priesthood and later Black Power; the resentment that fueled his opposition to affirmative action; the conservative beliefs that ultimately

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1. Ken Fosskett, *The Clarence Thomas You Don't Know He's a Generous Mentor, a Talkative Friend, Amiable with Strangers, Proud, Complex—and an Enthusiastic Bus Driver*, ATLANTA J.-CONST., July 1, 2001, at A1; Ken Fosskett, *Trials of Life: Racism was One Challenge. Another was Meeting His Grandfather's Expectations*, ATLANTA J.-CONST., July 2, 2001, at A1; Ken Fosskett, *Refusing to Court Favor Youngest Justice Accepts Being 'A Thorn in the Side' of Those Who Vilify Him*, ATLANTA J.-CONST., July 3, 2001, at A1.

led him to the Supreme Court steps; and the inner resilience that propelled him through the doors.²

I am a fan of judicial biographies but I must say I was wary of reading one of a living justice. How can one assess the career of someone who is perhaps only a third of the way through his judicial career? Thomas has been on the Court fourteen years. If he stays until he is eighty-five, he could be on the Court another thirty years. In the end, however, there is enough evidence in this volume about just why Clarence Thomas is an important enough judge to deserve such a microscopic biography. Thomas is constantly in the news. Some in the Bush administration have floated Thomas's name as a likely successor to Chief Justice Rehnquist. Although a former clerk and current law professor, John C. Yoo, believes Thomas "can do more good for the country as an outspoken associate justice than he could as chief justice."³ Thomas also made headlines recently when it was reported that he had accepted much more valuable gifts than his Supreme Court colleagues over the last six years.⁴

This book is not your traditional judicial biography. For starters, the book devotes several chapters to a fascinating look at Thomas's ancestors, all the way back to 1832. Thomas's fierce strain of independence is clearly foreshadowed by his great-great-grandfather, Sandy Wilson who, in 1867, paid \$100 cash for forty acres of Liberty County farmland and "never worked for a white man again."⁵ The book also takes a deep look at the segregated south; from Sherman's march through Georgia, to Reconstruction and the hard road freed blacks traveled. This immersion is relevant because it unearths a strain that marks Thomas to this day—the yearning for independence, for the black man's need to survive in a white world without a handout from white society. Mr. Foscett argues that Thomas's life and work can be properly understood only in reference to race in America, particularly as it played out in his childhood.

Looking at the facts of Thomas's life one is struck by the contradictions. He was a beneficiary of affirmative action yet he is devoted to the notion of a colorblind Constitution. He is the "uncompromising tough guy" who could dissolve "into an emotional, sensitive man."⁶

2. KEN FOSKETT, *JUDGING THOMAS: THE LIFE AND TIMES OF CLARENCE THOMAS*, at front flap (2004).

3. John C. Yoo, *Clarence Thomas is in the Right Seat*, L.A. TIMES, Jan. 5, 2005, at B11.

4. Richard A. Serrano & David G. Savage, *Justice Thomas Reports Wealth of Gifts*, L.A. TIMES, Dec. 31, 2004, at A1.

5. FOSKETT, *supra* note 2, at 31.

6. *Id.* at 313.

I was familiar with the broad outlines of Thomas's life, from his journey from Pin Point, Georgia, to Yale Law School, to his tenure as head of the EEOC under Reagan, and his wrenching appearance before the Senate when he faced off with Anita Hill. But I was wholly unaware of certain parts of Thomas's life: his deep love of children, his love of NASCAR racing, and how he loves to roam the country with his wife in his forty foot mobile home.

What I especially like about the book is how the author does not try to whitewash Thomas's life. He boldly restates every criticism that has ever been lodged against Thomas: charges of opportunism, of turning his back on blacks, and of currying favor with important white people. Every charge is painstakingly dealt with. While it is clear that the author likes Clarence Thomas, he does not shrink from inspecting his every motive and action. For example, Mr. Foscett writes that Thomas's absolutist philosophy often blinds him to nuance.⁷ In another instance, Mr. Foscett labels Thomas's denunciation of welfare as "shrill."⁸ Moreover, when Thomas defended Republicans in Congress who were attacking President Clinton's judicial nominees, Mr. Foscett characterizes the tenor of Thomas's remarks as "petty, self-pitying."⁹

Judging Thomas spends considerable time identifying people and institutions that have influenced the thinking of Clarence Thomas. Myers Anderson, Thomas's grandfather who relentlessly dominated his early years, clearly shaped Thomas's libertarian political philosophy. The Catholic Church "gave him the courage to hold contrary beliefs—the character trait that defines him today."¹⁰ After a twenty-eight year estrangement, from the assassination of Martin Luther King, Jr. in 1968, Thomas rejoined the Catholic Church in 1996. While the book claims that the "tumult of the Savannah civil rights struggle played a key role in shaping [Thomas's] beliefs about equality and discrimination,"¹¹ there is little direct evidence of this. As for writers, Thomas liked Richard Wright because "[h]e's an angry black novelist . . . and I was an angry black man."¹² He is also such a fan of Ayn Rand's *The Fountainhead* that he requires his law clerks to sit through a screening of the film adapted from the book.¹³ Mr. Foscett cites the first Justice Harlan's

7. *Id.* at 18.

8. *Id.* at 191.

9. *Id.* at 295.

10. FOSKETT, *supra* note 2, at 66.

11. *Id.* at 67.

12. *Id.* at 82.

13. *Id.* at 280.

dissent in *Plessy v. Ferguson*¹⁴ as support for Thomas's color-blind view of the Constitution.¹⁵

The book properly investigates the roots of Thomas's invocation of natural law, a controversial "method of constitutional interpretation, even among conservative judges"¹⁶ that posits "that a higher law, God's law, was the ultimate standard against which man's laws were to be judged."¹⁷ According to Mr. Foscett, the only way Thomas could reconcile original intent with the existence of slavery in America was to focus on the natural law language in the Declaration of Independence.¹⁸ "God's law taught Thomas to believe in his innate equality."¹⁹ In support of this philosophy, Thomas also relied on Harry Jaffa, a German-born philosopher and Leo Strauss disciple, and on "Lewis Lehrman, a noted New York conservative, for an essay that used natural law to provide a moral basis for laws outlawing abortion."²⁰ Thomas's support for natural law almost cost him his seat on the Supreme Court and could still come back to haunt him should he be nominated to become the next Chief Justice.

Fittingly, the most dramatic chapters in the book are those chronicling Thomas's nomination to the Supreme Court. Even though most are familiar with the broad outlines of Thomas's traumatic experience appearing before the Senate, Mr. Foscett's account captures the mini-dramas of belt-way politics with photographic intensity. Mr. Foscett's account is never less than compelling as he describes the pounding Senator Biden gave Thomas about natural law during his twenty-five hours of testimony, "the second longest grilling of a Supreme Court nominee in history."²¹ While Thomas delivered almost a "carbon copy of Souter's responses"²² when he sailed through the Senate, Mr. Foscett describes Thomas's performance as "too cautious, too programmed."²³ "The strategy of vague answers, so effective for Souter, made Thomas appear dumb, shifty and evasive."²⁴

While Thomas insisted he had no position on *Roe v. Wade*,²⁵ senatorial questioning returned more than seventy times to abortion over the course of

14. 163 U.S. 537 (1896).

15. *Plessy*, 163 U.S. at 552 (Harlan, J., dissenting); FOSKETT, *supra* note 2, at 190–91.

16. FOSKETT, *supra* note 2, at 219.

17. *Id.* at 190.

18. *Id.* at 189–90.

19. *Id.* at 190.

20. *Id.* at 188, 190, 214.

21. FOSKETT, *supra* note 2, at 229.

22. *Id.* at 228.

23. *Id.* at 229.

24. *Id.* at 261.

25. 410 U.S. 113 (1973).

the hearings.²⁶ When Thomas learned of Anita Hill's testimony before the Senate, accusing him of sexual harassment, "I felt like throwing up,"²⁷ he told his most ardent supporter, Senator Danforth. If there is any weakness in this account of the "he said/she said" dispute, it is that Mr. Foscett never discloses his own opinion on who he thinks was lying.²⁸ In effect, he throws up his hands and concludes, "[t]he contradictions between" Hill and Thomas "were never resolved."²⁹ Not once did the author ask Thomas whether he enjoyed pornography, as Hill alleged. (Not that there is any necessary correlation between liking porn and committing sexual harassment or being deeply religious, as Thomas is portrayed throughout the book). In the end, Thomas squeaked through the Senate, fifty-two to forty-eight, with "the highest number of negative votes for any Supreme Court justice in American history."³⁰

While Mr. Foscett devotes a chapter to analyzing key judicial opinions by Thomas on matters of race, religion, affirmative action, and criminal law, serious students of Justice Thomas's legal writings should consult Scott Douglas Gerber's *First Principles: The Jurisprudence of Clarence Thomas*.³¹ Mr. Foscett clearly endorses Mr. Gerber's conclusion "that Thomas's most significant impact on the Court was in the area of race and his insistence on a color-blind reading of the Constitution."³² While Thomas likes bright line rules and is clearly drawn to constitutional textualism, Mr. Foscett makes clear that the "integrity of [Thomas's] methodology becomes murkier when the cases involve issues close to [his] heart, such as race and the law, or religion in school."³³

The figure who finally emerges in Mr. Foscett's rich, enveloping story is a proud, sensitive, brooding man who is still deeply scarred by his humiliating Supreme Court confirmation. Mr. Foscett finds just the right words to sign off with, quoting Thomas in summing up his life thus far: "[a]t bottom, I merely tried to do as my grandfather advised: make the best of the hand that had been dealt me."³⁴ The eventfulness of Thomas's extraordinary life and the refreshing intelligence and craft of the author make this book a pleasure to read.

26. FOSKETT, *supra* note 2, at 224, 228.

27. *Id.* at 234.

28. *Id.* at 235.

29. *Id.* at 250.

30. *Id.* at 253.

31. SCOTT DOUGLAS GERBER, *FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS* (1999).

32. FOSKETT, *supra* note 2, at 298.

33. *Id.* at 279.

34. *Id.* at 319.

SOFTWARE TERMINOLOGY: HOW TO DESCRIBE A SOFTWARE INVENTION IN A UNITED STATES PATENT APPLICATION

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I. INTRODUCTION

Software patent drafting and prosecution is still an emerging field because of the constant changes and developments in the evolution of software patents. Patent practitioners that draft software patents have to be concerned with meeting the patentability requirements of the *United States Code* along with the restrictions in the case law. In addition, there are other challenges associated with the proper drafting of a software patent application including the natural ambiguity of language, the ever-occurring developments in the software field, and the maximization of the protective lifespan of the inven-

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tion. Accordingly, it is imperative that patent practitioners who draft software patents understand the limitations of the terminology that can be used to describe software.

The importance of drafting patent applications that properly protect the invention along with any variations is the amount of money that can be involved in patent litigation lawsuits. One such lawsuit involved Pitney Bowes suing Hewlett-Packard for allegedly infringing on its patented technology that "uses beams of light to make variable-sized dots which help to smooth the edges of characters, making the letters and numbers less blurry."¹ "Pitney Bowes was seeking damages of more than \$1billion," but settled for \$400 million in cash.² Another such lawsuit involves Stac Electronics, who won a lawsuit against Microsoft for patent violations involving data compression patents.³ This lawsuit was settled by Microsoft paying Stac approximately \$83 million.⁴ Both of these settlements are examples of why using the correct terminology in a software patent is paramount because it may mean the difference between winning or losing a patent lawsuit which could involve millions of dollars.

A. *Overview*

Part I of this article will discuss the different areas of concern for patent practitioners including the different sections of the *United States Code* that have to be satisfied for the successful prosecution, offensive use, and defense of a software patent. Part II will review the different terminology that can be used to describe software technology. This terminology includes method, apparatus, computer, system, means-plus-function, computer-readable medium, computer program product, and article of manufacture. In addition, Part II provides claim examples of the different terminology along with any court decisions that affect the interpretation of the terminology. Part III gives a conclusion of the terminology that can be used to describe a software invention. In addition, Part III will review the terminology along with suggestions on how to draft sample claims.

1. *Hewlett-Packard Settles up to the Tune of \$400 Million*, NAT'L L.J., June 18, 2001, at A12.

2. *Id.*

3. T.C. Doyle, *Microsoft to Pay \$83M to Settle Stac Compression Suit*, COMPUTER RESELLER NEWS, June 27, 1994, at 7.

4. *Id.*

B. Challenges of Software Patents

One challenge in drafting software patents is that the “ambiguity of claim language necessarily results in uncertainty in the scope of protection.”⁵ Part of this ambiguity stems from the disagreement among experts about the definitions of software-related terms.⁶ An example of a word that has caused ambiguity is algorithm.⁷ In *Diamond v. Diehr*,⁸ the practitioner defined algorithm to have a general meaning, while the court held algorithm to have a narrower definition.⁹ Accordingly, all words have some form of ambiguity, especially when the allowance of the patent is concerned or a lawsuit involving millions of dollars.¹⁰ Thus, it is imperative that patent practitioners have a solid foundation of the software terminology that is used in patent applications and how the United States Patent and Trademark Office (USPTO) and the courts have construed the terminology.

Another challenge in drafting software patents is that “words do not exist to describe” the invention.¹¹ This is because “[t]hings are not made for the sake of words, but words for things.”¹² Thus, there may not be ambiguity in the terminology used in the patent application, but the terminology may be undefined in the field of art and thus needs to be properly defined by the patent practitioner drafting the patent application. This challenge is especially important in software patents because software in itself is an emerging field and first received patent protection less than twenty-five years ago.¹³ Accordingly, the terminology is still developing and patent practitioners should pay special heed to the challenge of defining new words.

Another challenge is that patent practitioners must be meticulous when drafting the patent specification and claims to ensure that the claims can be useful during the entire “enforcement duration” of twenty years.¹⁴ Since the software field is in constant flux, software patents that are drafted with only

5. Stephen J. Stark, *Key Words and Tricky Phrases: An Analysis of Patent Drafters' Attempts to Circumvent the Language of 35 U.S.C. § 112*, 5 J. INTELL. PROP. L. 365, 371 (1997).

6. Judith A. Szepesi, *Maximizing Protection for Computer Software*, 12 SANTA CLARA COMPUTER & HIGH TECH. L.J. 173, 175 (1996).

7. *Id.*

8. 450 U.S. 175 (1981).

9. *Id.* at 186 n.9.

10. See Szepesi, *supra* note 6, at 177.

11. Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., 535 U.S. 722, 731 (2002) (quoting Autogiro Co. of Am. v. United States, 384 F.2d 391, 397 (Ct. Cl. 1967)).

12. *Id.* (quoting Autogiro Co. of Am., 384 F.2d at 397).

13. See *Diamond*, 450 U.S. at 175.

14. Keith E. Witek, Comment, *Developing a Comprehensive Software Claim Drafting Strategy for U.S. Software Patents*, 11 BERKELEY TECH. L.J. 363, 366 (1996).

today's implementation of the invention in mind may not protect the owner from future changes in technology. One example is in the field of high performance computing. Twenty years ago, high performance computers were single system machines such as Cray supercomputers.¹⁵ Today, high performance computing is being moved to clusters of machines such as a Beowulf cluster.¹⁶ This type of innovative change would dramatically degrade the protection of software that stated its use was only on Cray supercomputers without giving the option of different types of high performance computing systems. Accordingly, the terminology used in a software patent is important to ensure the maximum effective life of the patent is not diminished because of poor word choices.

Accordingly, understanding the perils and requirements of the *United States Code* and case law will enable patent practitioners who draft software patents to develop fully the invention into a form that will provide the maximum protection under the law. This understanding will benefit both patent practitioners and software inventors by ensuring that the patent practitioners can draft the patent application in a form that will benefit the inventor and the inventor will have the invention protected to the fullest extent allowed by the law.

C. *Meeting the 35 U.S.C. § 101 Requirements*

Patent practitioners drafting software patents must first be concerned with the requirements of 35 U.S.C. § 101¹⁷ because the line between patentable software and non-patentable software is sometimes still in flux. Section 101 provides that "[w]hoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title."¹⁸ The concern for software is not "*which* of the four categories of subject matter a claim is directed to—process, machine, manufacture, or composition of matter—but rather on the essential characteristics of the subject matter, in particular, its practical util-

15. See WILLIAM GROPP ET AL., *USING MPI: PORTABLE PARALLEL PROGRAMMING WITH THE MESSAGE-PASSING INTERFACE 1* (Janusz Kowalik ed., The MIT Press 2d ed. 1999).

16. *Id.*

17. 35 U.S.C. § 101 (2000).

18. *Id.*

ity.”¹⁹ Thus, the invention must have “some type of practical application, i.e., ‘a useful, concrete and tangible result.’”²⁰

For example, a claim directed to a word processing file stored on a disk may satisfy the utility requirement of 35 U.S.C. [§] 101 since the information stored may have some “real world” value. However, the mere fact that the claim may satisfy the utility requirement of 35 U.S.C. [§] 101 does not mean that a useful result is achieved under the practical application requirement. The claimed invention as a whole must produce a “useful, concrete and tangible” result to have a practical application.²¹

Accordingly, patent practitioners drafting software patents must draft the application in such a way to ensure that the described invention produces “a useful, concrete, and tangible result.”²² This requirement will be further analyzed through the review of the terminology.

D. *Pitfalls of 35 U.S.C. § 112*

Section 112 of the Patent Act has six paragraphs of which three present pitfalls to the successful allowance and court challenge of a software patent.²³

19. *State St. Bank & Trust Co. v. Signature Fin. Group, Inc.*, 149 F.3d 1368, 1375 (Fed. Cir. 1998) (noting that the subject matter must still fall into at least one of the categories).

20. *Id.* at 1373 (quoting *In re Alappat*, 33 F.3d 1526, 1544 (Fed. Cir. 1994)).

21. U.S. PATENT AND TRADEMARK OFFICE, U.S. DEP’T OF COMMERCE, MANUAL OF PATENT EXAMINING PROCEDURE 2100–6 (8th ed. 2d rev. 2004) [hereinafter MPEP].

22. *Alappat*, 33 F.3d at 1544.

23. 35 U.S.C. § 112 (2000). Section 112 states:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention.

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

A claim may be written in independent or, if the nature of the case admits, in dependent or multiple dependent form.

Subject to the following paragraph, a claim in dependent form shall contain a reference to a claim previously set forth and then specify a further limitation of the subject matter claimed. A claim in dependent form shall be construed to incorporate by reference all the limitations of the claim to which it refers.

A claim in multiple dependent form shall contain a reference, in the alternative only, to more than one claim previously set forth and then specify a further limitation of the subject matter claimed. A multiple dependent claim shall not serve as a basis for any other multiple dependent claim. A multiple dependent claim shall be

The first paragraph has three separate and distinct requirements.²⁴ The first requirement is that the specification must contain a written description of the invention that is “a full and clear disclosure of the invention.”²⁵ The second requirement is that there must be a description on how “to make and use the invention.”²⁶ This “enablement requirement” is required so “that one skilled in the art can make and use the claimed invention ... to ensure that the invention is communicated to the interested public in a meaningful way.”²⁷ The third requirement of the first paragraph is the disclosure of the best mode of the invention.²⁸ “The best mode requirement is a safeguard against the desire on the part of some people to obtain patent protection without making a full disclosure as required by the statute.”²⁹ The three requirements of the first paragraph of § 112 can all create pitfalls for the patent practitioner unaccustomed to drafting software patent applications especially viewed in light of who is skilled in the software arts.

The second paragraph of § 112 contains two separate requirements to satisfy the statute.³⁰ The first requirement is that “the claims must set forth the subject matter that applicants regard as their invention.”³¹ This requirement places the burden on the patent practitioner to ensure that the claimed invention is the invention that the inventor or assignee desires and needs to be protected. The second requirement is that “the claims must particularly point out and distinctly define the metes and bounds of the subject matter that will be protected by the patent grant.”³² Patent practitioners should work to avoid the pitfall of this requirement because failure to fulfill the requirement could lead to claims that are ambiguous and thus do not adequately protect the invention. This requirement is examined by “whether the scope

construed to incorporate by reference all the limitations of the particular claim in relation to which it is being considered.

An element in a claim for a combination may be expressed as a means or step for performing a specified function without the recital of structure, material, or acts in support thereof, and such claim shall be construed to cover the corresponding structure, material, or acts described in the specification and equivalents thereof.

Id.

24. MPEP, *supra* note 21, at 2100-163.

25. *Id.*

26. MPEP, *supra* note 21, at 2100-163; *accord* § 112.

27. MPEP, *supra* note 21, at 2100-184.

28. § 112.

29. MPEP, *supra* note 21, at 2100-200.

30. *Id.* at 2100-203 (citing § 112).

31. *Id.*

32. *Id.*

of the claim is clear to a hypothetical person possessing the ordinary level of skill in the pertinent art.”³³

The sixth paragraph of § 112 allows for means-plus-function claims to be used.³⁴ The use of the sixth paragraph allows for means-plus-function claims, but the claims must meet a three-part test:

A claim limitation will be interpreted to invoke 35 U.S.C. [§] 112, sixth paragraph, if it meets the following 3-prong analysis:

(A) the claim limitations must use the phrase “means for” or “step for”;

(B) the “means for” or “step for” must be modified by functional language; and

(C) the phrase “means for” or “step for” must not be modified by sufficient structure, material or acts for achieving the specified function.³⁵

Beyond meeting the three-part test, the claims must also meet the definiteness requirement in “that the corresponding structure ... of a means (or step)-plus-function limitation must be disclosed in the specification itself in a way that one skilled in the art will understand what structure ... will perform the recited function.”³⁶ Thus, for a patent practitioner to properly utilize the sixth paragraph of § 112, the three-part test must be satisfied along with the other requirements to avoid rejections.

Another challenge when viewed in light of the requirements of § 112 is the United States Supreme Court’s holding in *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*³⁷ In *Festo Corp.*, the Court held that “if a § 112 amendment is necessary and narrows the patent’s scope—even if only for the purpose of better description—estoppel may apply.”³⁸ Thus, patent practitioners should be concerned that any modifications to the claims to satisfy § 112 may limit the scope of the invention. Although the presumption is against the narrowing amendment, the presumption can be rebutted but “[t]he patentee must show that at the time of the amendment one skilled in the art

33. *Id.*

34. § 112.

35. MPEP, *supra* note 21, at 2100-221.

36. *Id.* at 2100-224 (citing *Atmel Corp. v. Info. Storage Devices, Inc.*, 198 F.3d 1374, 1381 (Fed. Cir. 1999)).

37. 535 U.S. 722 (2002).

38. *Id.* at 737.

could not reasonably be expected to have drafted a claim that would have literally encompassed the alleged equivalent.”³⁹ Accordingly, the Supreme Court’s holding may create problems for patent applications that are not properly described in the specification and claimed in the patent application. Patent practitioners that draft software patents should take extra precautions to ensure that the requirements of § 112 are met and that no amendments that may narrow the patent’s scope are needed.

E. *Avoiding 35 U.S.C. § 102 and 35 U.S.C. § 103 Rejections*

Patent practitioners also have to draft to avoid 35 U.S.C. § 102⁴⁰ and 35 U.S.C. § 103⁴¹ rejections. Software patent applications have been found to

39. *Id.* at 741.

40. 35 U.S.C. § 102 (2000). Section 102 provides in part:

A person shall be entitled to a patent unless—

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent, or

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States, or

(c) he has abandoned the invention, or

(d) the invention was first patented or caused to be patented, or was the subject of an inventor’s certificate, by the applicant or his legal representatives or assigns in a foreign country prior to the date of the application for patent in this country on an application for patent or inventor’s certificate filed more than twelve months before the filing of the application in the United States, or

(e) The invention was described in—

(1) an application for patent, published under section 122(b), . . . ; or

(2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, . . . ; or

(f) he did not himself invent the subject matter sought to be patented, or

(g)(1) during the course of an interference conducted under section 135 or section 291, another inventor involved therein establishes, to the extent permitted in section 104, that before such person’s invention thereof the invention was made by such other inventor and not abandoned, suppressed, or concealed, or (2) before such person’s invention thereof, the invention was made in this country by another inventor who had not abandoned, suppressed, or concealed it. In determining priority of invention under this subsection, there shall be considered not only the respective dates of conception and reduction to practice of the invention, but also the reasonable diligence of one who was first to conceive and last to reduce to practice, from a time prior to conception by the other.

Id.

41. 35 U.S.C. § 103 (2000). Section 103 provides in part:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

be more susceptible to certain rejections.⁴² These rejections are also commonplace in non-software patent applications, but because of the relatively new entry of software patents into the patent realm and the ever-changing terminology used in the patent application, software patents seem to be especially susceptible to these rejections.⁴³

One common rejection is “that differences between a claimed invention and a prior art reference represent ‘mere design alternatives.’”⁴⁴ The second common rejection is that “it would have been obvious to one skilled in the art at the time of the invention to combine the teaching of” prior art with another idea to give the claimed invention.⁴⁵ Besides these two rejections, patent practitioners have to be concerned with all of the other rejections that may stem from §§ 102 and 103. These rejections include publications, prior sales, public use, and other similar rejections stemming from the statutes. Accordingly, patent practitioners should be aware of the common software rejections and draft the software patent application in view of these rejections.

II. TERMINOLOGY

A. *Method*

The use of methods or processes in software patents is widely used, because most software inventions are implemented in the computer by a method or algorithm. Section 100(b) of the Patent Act states that “‘process’ means process, art or method, and includes a new use of a known process, machine, manufacture, composition of matter, or material.”⁴⁶ “Software process claims can be found in roughly 85% of all issued U.S. software patents.”⁴⁷ One reason that methods are widely used is that algorithms are easily transferred into a description and claim utilizing a method approach. Thus, the widespread use of the method and process claims make it imperative that patent practitioners understand the limitations and properly utilize the claims to fully describe the invention.

Id.

42. Stuart P. Meyer, *Obtaining and Enforcing Patents for Software-Related Inventions: Avoiding the Pitfalls*, 5 SOFTWARE L.J. 715, 722 (1992).

43. *Id.*

44. *Id.*

45. *Id.*

46. 35 U.S.C. § 100(b).

47. Witek, *supra* note 14, at 385.

A method claim must involve “the transformation or conversion of subject matter representative of or constituting *physical activity or objects*.”⁴⁸ It is important that the method not just do acts within the computer without some sort of significant output to show for the method. In addition, the claims cannot “consist solely of mathematical operations without some claimed practical application” or “simply manipulate abstract ideas ... without some claimed practical application.”⁴⁹ Patent practitioners need to pay special heed to ensure that the method specifically accomplishes some sort of “practical application.”⁵⁰

A process is statutory if it requires physical acts to be performed outside the computer independent of and following the steps to be performed by a programmed computer, where those acts involve the manipulation of tangible physical objects and result in the object having a different physical attribute or structure.⁵¹

This “manipulation of tangible physical objects” can include several categories of different acts.⁵² One type of act is “physical acts to be performed outside the computer.”⁵³ Examples of this type of act are:

- A method of curing rubber in a mold which relies upon updating process parameters, using a computer processor to determine a time period for curing the rubber, using the computer processor to determine when the time period has been reached in the curing process and then opening the mold at that stage.
- A method of controlling a mechanical robot which relies upon storing data in a computer that represents various types of mechanical movements of the robot, using a computer processor to calculate positioning of the robot in relation to given tasks to be performed by the robot, and controlling the robot's movement and position based on the calculated position.⁵⁴

Both of these acts are physical acts that are accomplished outside of the computer, but the computer is used to control the parameters of the physical acts. These types of physical acts are allowable patent claims because the

48. *In re Schrader*, 22 F.3d 290, 294 (Fed. Cir. 1994).

49. MPEP, *supra* note 21, at 2100-12.

50. *Id.*

51. *Id.* at 2100-15 (citing *Diamond v. Diehr*, 450 U.S. 175, 187 (1981)).

52. *Id.*

53. *Id.*

54. MPEP, *supra* note 21, at 2100-15 to -16.

objects have “a different physical attribute or structure” upon completion of the act.⁵⁵ Thus, one way to ensure compliance is to ensure that acts outside of the computer are being accomplished by the method. Physical acts outside of the computer are sometimes difficult—if not impossible—to integrate into software patent claims, but where the computer is interacting without outside objects, this type of claim reduces the risk that the claim will be rejected by the USPTO.

Another type of act that satisfies the statutory requirements is an act that produces “a useful, concrete, and tangible result.”⁵⁶ This type of act allows methods that consist solely in the computer without touching physical items outside of the computer. However, the act must have a result that accomplishes a real goal instead of just pushing around ones and zeros and giving no real result. This distinction may sometimes be difficult to achieve because simply applying an algorithm in a software claim will not suffice to protect the invention while applying an algorithm to achieve “a useful, concrete, and tangible result” has been held to meet the statutory requirements.⁵⁷ The issue then becomes what exactly is “a useful, concrete, and tangible result.”⁵⁸ The following examples are acts that produce “a useful, concrete, and tangible result”:⁵⁹

- A computerized method of optimally controlling transfer, storage and retrieval of data between cache and hard disk storage devices such that the most frequently used data is readily available.
- A method of controlling parallel processors to accomplish multi-tasking of several computing tasks to maximize computing efficiency
- A method of making a word processor by storing an executable word processing application program in a general purpose digital computer's memory, and executing the stored program to impart word processing functionality to the general purpose digital computer by changing the state of the computer's arithmetic logic unit when program instructions of the word processing program are executed.

55. *Id.* at 2100-15 (citing *Diamond*, 450 U.S. at 187).

56. *In re Alappat*, 33 F.3d 1526, 1544 (Fed. Cir. 1994).

57. *Id.*

58. *Id.*

59. *Id.*

- A digital filtering process for removing noise from a digital signal comprising the steps of calculating a mathematical algorithm to produce a correction signal and subtracting the correction signal from the digital signal to remove the noise.⁶⁰

Although some of these acts may not seem to produce “a useful, concrete, and tangible result,”⁶¹ the optimization of data for increased speed or efficiency is a result that has been held to be useful, concrete, and tangible.⁶² Although a process “simply calculat[ing] a mathematical algorithm that models noise is nonstatutory.”⁶³ In addition, the imparting of increased functionality to the computer by introducing program instructions to the computer has also been held statutory.⁶⁴ Thus, it is imperative that method claims give a result that is not just a mathematical algorithm, but also give a result that is actually accomplishing a result that can be quantified as accomplishing a goal that can be utilized by humans instead of just a machine calculation.

The following example is claim one of U.S. Patent No. 5,333,184:

1. A method for use in a telecommunications system in which interexchange calls initiated by each subscriber are automatically routed over the facilities of a particular one of a plurality of interexchange carriers associated with that subscriber, said method comprising the steps of:

generating a message record for an interexchange call between an originating subscriber and a terminating subscriber, and including, in said message record, a primary interexchange carrier (PIC) indicator having a value which is a function of whether or not the interexchange carrier associated with said terminating subscriber is a predetermined one of said interexchange carriers.⁶⁵

Claim one of U.S. Patent No. 5,333,184 was challenged in *AT&T Corp. v. Excel Communications, Inc.*⁶⁶ as being outside the scope of § 101.⁶⁷ The important aspect of claim one is that the method generates a primary interex-

60. MPEP, *supra* note 21, at 2100-18 (citing *In re Bernhart*, 417 F.2d 1395, 1400 (C.C.P.A. 1969)).

61. *Alappat*, 33 F.3d at 1544.

62. MPEP, *supra* note 21, at 2100-18.

63. *Id.*

64. *See id.*

65. U.S. Patent No. 5,333,184 (issued July 26, 1994).

66. 172 F.3d 1352 (Fed. Cir. 1999).

67. *Id.* at 1358.

change carrier indicator which is “a useful, non-abstract result that facilitates differential billing of long-distance calls made by an IXC’s subscriber.”⁶⁸ The court held that “[b]ecause the claimed process applies the Boolean principle to produce a useful, concrete, tangible result without pre-empting other uses of the mathematical principle, on its face the claimed process comfortably falls within the scope of § 101.”⁶⁹

In *AT&T Corp.*, the important distinction that allowed this claim to be statutory was that the result had “a useful, concrete, and tangible result.”⁷⁰ The result was useful because it facilitated the collection of long distance billing data.⁷¹ The result was concrete because it generated and included the primary interexchange carrier indicator that was used for a certain purpose.⁷² The result was tangible because it was used to bill customers and therefore could be used to produce tangible bills for the customers.⁷³ Accordingly, this claim was held to be statutory and is an example of how the specification interlinks with the claim language to ensure compliance with the requirements of software patents.⁷⁴

The following example is claim one of U.S. Patent No. 6,763,397:

1. A method for verifying instructions in a module of a computer program, the method comprising:
 - ascertaining whether checking an instruction in a first module that is loaded requires information in a referenced module different than the first module;
 - if the information is required, determining whether the referenced module is already loaded;
 - if the referenced module is determined to be not already loaded, writing a constraint for the referenced module without loading the referenced module; and
 - verifying the instruction in the first module, the verifying comprising placing a list including a referenced type defined in a not-yet-loaded module and a different type at a fixed position in a merged snapshot.⁷⁵

68. *Id.*

69. *Id.* (citing *Arrhythmia Research Tech., Inc. v. Corazonix Corp.*, 958 F.2d 1053, 1060 (Fed. Cir. 1992)).

70. *Alappat*, 33 F.3d at 1544.

71. *AT&T Corp.*, 172 F.3d at 1358.

72. *Id.*

73. *Id.*

74. .

75. United States Patent No. 6,763,397 (issued July 13, 2004) [hereinafter Patent 6,763, *Id* 397].

The question then becomes whether claim one has “a useful, concrete, and tangible result.”⁷⁶ The method claim is checking about whether instructions have loaded into a module and verifying those results.⁷⁷ This verification is important to ensure that information is correctly loaded. The method claim is also reducing the loading of modules by writing a constraint in lieu of loading the full instruction set. This type of optimization is similar to the “computerized method of optimally controlling transfer, storage and retrieval of data between cache and hard disk storage devices such that the most frequently used data is readily available.”⁷⁸ Since this method is optimizing the access of data for increased access speed, this claim satisfies the statutory requirements of § 101.⁷⁹

After meeting the requirements of § 101, patent practitioners also have to ensure that the method claim meets the requirements of § 112.⁸⁰ This includes satisfying the first paragraph of § 112, which requires that the invention is fully and clearly disclosed, that the description is enabling, and that the best mode is disclosed.⁸¹ In addition, the second paragraph of § 112 must also be satisfied. This includes claiming the applicant’s invention and specifying the proper bounds of the invention.⁸² In addition, patent practitioners should be aware of the common rejections under § 102⁸³ and § 103.⁸⁴ Accordingly, patent practitioners drafting software patents have many concerns to ensure that the patent application will not be rejected and that the inventor will receive the broadest application of the claims.

B. *Apparatus*

After *State Street Bank & Trust Co. v. Signature Financial Group, Inc.*,⁸⁵ apparatus claims in software patents are not as limited by the type of software that is being implemented on the apparatus, but whether the apparatus accomplishes “a useful, concrete, and tangible result.”⁸⁶ Apparatus claims also have to be “directed to a specific apparatus of practical utility and

76. *Alappat*, 33 F.3d at 1544.

77. Patent 6,763,397, *supra* note 75.

78. MPEP, *supra* note 21, at 2100-18.

79. 35 U.S.C. § 101 (2000).

80. 35 U.S.C. § 112 (2000).

81. MPEP, *supra* note 21, at 2100-163.

82. *Id.* at 2100-203.

83. 35 U.S.C. § 102 (2000).

84. 35 U.S.C. § 103 (2000).

85. 149 F.3d 1368 (Fed. Cir. 1998).

86. *Id.* at 1373 (quoting *Alappat*, 33 F.3d at 1544).

specified application.”⁸⁷ Thus, apparatus claims have the same type of limitation as method claims. One benefit to an apparatus claim is that the burden of proving utility may be a little lower because the hardware aspect of the apparatus would in itself lend a type of machine that may qualify under § 101.⁸⁸ Section 101 of the Patent Act provides that “[w]hoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.”⁸⁹ Thus, patent practitioners need to ensure that the apparatus claims meet the requirement of “a useful, concrete, and tangible result.”⁹⁰

One way the requirement for “a useful, concrete, and tangible result” is met is to ensure a relationship between the hardware devices and software implementation.⁹¹ “If it appears that the mathematical algorithm is implemented in a specific manner to define structural relationships between the physical elements of the claim (in apparatus claims) or to refine . . . , *the claim being otherwise statutory*, the claim passes muster under § 101.”⁹² The following example is claim fifteen of U.S. Patent No. 6,763,397:

15. A verification apparatus comprising:

a computer readable storage medium for storing a module of a computer program;

a memory into which a module is loaded;

a processor configured to ascertain whether checking an instruction in a first module that is loaded requires information in a referenced module different than the first module, to determine whether the referenced module is already loaded if the information is required, to write a constraint for the referenced module without loading the referenced module if the referenced module is determined to be not already loaded, and to verify the instruction in the first module, wherein verifying comprises placing a list including a referenced type defined in a not-yet-loaded module and a different type at a fixed position in a merged snapshot.⁹³

87. Arrhythmia Research Tech., Inc. v. Corazonix Corp., 958 F.2d 1053, 1061 (Fed. Cir. 1992).

88. § 101.

89. *Id.*

90. *Alappat*, 33 F.3d at 1544.

91. *Id.*

92. *In re Abele*, 684 F.2d 902, 906 (C.C.P.A. 1982) (quoting *In re Walter*, 618 F.2d 758, 767 (C.C.P.A. 1980)).

93. Patent 6,763,397, *supra* note 75.

One issue for claim fifteen of U.S. Patent No. 6,763,397 is whether the result is “useful, concrete, and tangible.”⁹⁴ This analysis is similar to the analysis for method claims. In this regard, the claim is accomplishing something besides pushing ones and zeros around.⁹⁵ The claim is loading and verifying modules in the apparatus for verification purposes and thus seems to accomplish a result that is not just an algorithm.

In addition, the verification apparatus of claim fifteen of U.S. Patent No. 6,763,397 comprises the hardware devices which then have instructions that are loaded into the hardware.⁹⁶ Then verification is done on the module.⁹⁷ The hardware devices are the computer-readable storage medium, the memory, and the processor.⁹⁸ All of these hardware devices are linked to the software because the software is just contained on the hardware devices.⁹⁹ The software is simply telling the hardware what to do and is thus acting as a machine.

The following example is claim one of U.S. Patent No. 5,249,290:

1. A server apparatus for accessing one or more common resources using a plurality of server processes to which client service requests are assigned, said server apparatus comprising means for receiving an unassigned client service request . . . and means . . . for assigning said unassigned received client service request to a server process having a workload indication which is less than the workload indication of all other server processes.¹⁰⁰

The first issue for claim one of U.S. Patent No. 5,249,290 is whether the result is “useful, concrete, and tangible.”¹⁰¹ In this regard, claim one falls within the method claim examples in that the server apparatus is rearranging the workload between the servers to optimize the efficiency between servers.¹⁰² Accordingly, apparatus claims that are similar in result to method claims fall within the same categories and thus meet the statutory requirements in the same way as method claims. In addition, other types of appa-

94. *Alappat*, 33 F.3d at 1544.

95. *See* Patent 6,763,397, *supra* note 75

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. United States Patent No. 5,249,290 (issued Sept. 28, 1993) [hereinafter Patent 5,249,290].

101. *Alappat*, 33 F.3d at 1544.

102. *See* Patent 5,249,290, *supra* note 100; *see* MPEP, *supra* note 21, at 2100-18.

tus claims are computer, system, and means-plus-function claims.¹⁰³ These claim types are apparatus claims because they are all part of the machine category in that they are hardware that utilizes software to accomplish a goal.¹⁰⁴

1. Computer

Computer claims are a subtype of apparatus claims because the computer is simply a type of specialized apparatus. The following example is claim nineteen of U.S. Patent No. 5,249,290:

19. A computer network comprising
a server apparatus,
a plurality of client apparatuses connected to said server apparatus
... said server apparatus comprising
table means ...
means for receiving an unassigned client service request ...
means ... for accessing said table means to select in which range
said total number of client service requests lies and thus the
number of client service requests or workload that can be as-
signed to each server process, and
means, ... , for assigning said unassigned received client service
request to a server process having a workload indicator which is
less than the workload indicator of all other server processes.¹⁰⁵

The first issue for claim nineteen of United States Patent No. 5,249,290 is whether the result is “useful, concrete, and tangible.”¹⁰⁶ The first consideration is what is being accomplished by the claim. Claim nineteen is assigning the workload to different servers according to a workload indicator.¹⁰⁷ This is similar to allowed method claims because the result is directly affecting the efficiency between servers.¹⁰⁸ Thus, this computer claim is accomplishing “a useful, concrete, and tangible result.”¹⁰⁹

103. See MPEP, *supra* note 21, at 2100-14.

104. See *id.*

105. Patent 5,249,290, *supra* note 100.

106. *Alappat*, 33 F.3d at 1544.

107. Patent 5,249,290, *supra* note 100.

108. See MPEP, *supra* note 21, at 2100-18.

109. *Alappat*, 33 F.3d at 1544.

2. System

A second subtype of apparatus claims is system claims. System claims are a subtype of apparatus claims because the system is simply a type of specialized apparatus. The following example is claim forty-two of United States Patent No. 5,878,434:

42. A system for clash handling comprising:
 a first computer;
 a second computer connected to the first computer by a network link, the first computer and the second computer each containing a replica of a distributed database;
 means for merging out a representation of operations performed on the first computer and applying at least a portion of the operations to the second replica;
 means for merging in a representation of operations performed on the second computer and applying at least a portion of the operations to the first computer replica;
 means for detecting persistent clashes during at least one of the merging steps; and
 means for recovering from at least a portion of the detected persistent clashes.¹¹⁰

The first issue for claim forty-two of U.S. Patent No. 5,878,434 is whether the result is “useful, concrete, and tangible.”¹¹¹ Claim forty-two is similar to method claims that increase the efficiency between computers except that this claim increases the efficiency by fixing the conflicts between the databases.¹¹² Accordingly, this claim was allowed by the USPTO and seems to meet the statutory requirements for software patents.¹¹³

3. Means-Plus-Function

A third subtype of apparatus claims is a means-plus-function claim. A means-plus-function claim is a subtype of apparatus claims because it is a type of machine, but the difference is that the machine is described by its function instead of a given name. Since the means-plus-function claim gets meaning from how it is described, the description of means-plus-function

110. United States Patent No. 5,878,434 (issued Mar. 2, 1999) [hereinafter Patent 5,878,434].

111. *Alappat*, 33 F.3d at 1544.

112. Patent 5,878,434, *supra* note 110; see MPEP, *supra* note 21, at 2100-18.

113. See Patent 5,878,434, *supra* note 110; see MPEP, *supra* note 21, at 2100-18.

claims in the specification is important because without an adequate description, the means-plus-function claims may be rejected.¹¹⁴ In this regard, paragraph six of § 112 states:

An element in a claim for a combination may be expressed as a means or step for performing a specified function without the recital of structure, material, or acts in support thereof, and such claim shall be construed to cover the corresponding structure, material, or acts described in the specification and equivalents thereof.¹¹⁵

In *B. Braun Medical, Inc. v. Abbott Laboratories*,¹¹⁶ the court held that a “structure disclosed in the specification is ‘corresponding’ structure only if the specification or prosecution history clearly links or associates that structure to the function recited in the claim.”¹¹⁷ In addition, the court stated:

[I]f one employs means-plus-function language in a claim, one must set forth in the specification an adequate disclosure showing what is meant by that language. If an applicant fails to set forth an adequate disclosure, the applicant has in effect failed to particularly point out and distinctly claim the invention as required by the second paragraph of section 112.¹¹⁸

Patent practitioners need to be concerned that the claim and specification are linked in such a manner that “particularly point[s] out and distinctly claim[s] that particular means.”¹¹⁹ Thus, it is vital to the software patent application that the patent practitioner ensures all means-plus-function claims are properly supported in the specification of the application. Another aspect of this requirement is that the “interpretation of what is disclosed must be made in light of the knowledge of one skilled in the art.”¹²⁰ This interpretation is limited to “whether one of skill in the art would understand the specification itself to disclose the structure, not simply whether that person would be capable of implementing that structure.”¹²¹

114. MPEP, *supra* note 21, at 2100-221.

115. 35 U.S.C. § 112 (2000).

116. 124 F.3d 1419 (Fed. Cir. 1997).

117. *Id.* at 1424.

118. *Id.* at 1425 (quoting *In re Donaldson Co.*, 16 F.3d 1189, 1195 (Fed. Cir. 1994)).

119. *Id.*

120. *Atmel Corp. v. Info. Storage Devices, Inc.*, 198 F.3d 1374, 1380 (Fed. Cir. 1999).

121. *Med. Instrumentation & Diagnostics Corp. v. Elekta AB*, 344 F.3d 1205, 1212 (Fed. Cir. 2003) (citing *Atmel Corp.*, 198 F.3d at 1382).

To reiterate, the following example is claim forty-two of United States Patent No. 5,878,434:

42. A system for clash handling comprising:
 a first computer;
 a second computer connected to the first computer by a network link, the first computer and the second computer each containing a replica of a distributed database;
 means for merging out a representation of operations performed on the first computer and applying at least a portion of the operations to the second replica;
 means for merging in a representation of operations performed on the second computer and applying at least a portion of the operations to the first computer replica;
 means for detecting persistent clashes during at least one of the merging steps; and
 means for recovering from at least a portion of the detected persistent clashes.¹²²

The means-plus-function terminology is further defined in the specification of U.S. Patent No. 5,878,434:

Synchronization of the database replicas is performed after the computers are reconnected. Synchronization includes a “merging out” step, a “merging in” step, and one or more clash handling steps. During the merging out step, operations performed on the first computer are transmitted to the second computer and applied to the second replica. During the merging in step, operations performed on the second computer are transmitted to the first computer and applied to the first replica.¹²³

The first issue is to ensure that the means-plus-function claim is properly supported in the specification.¹²⁴ Claim forty-two of United States Patent No. 5,878,434 discusses a means for merging operations on computers.¹²⁵ The specification of United States Patent No. 5,878,434 then discusses how this merging cooperation is accomplished between the computers.¹²⁶ Thus, the specification is supporting the means-plus-function part of claim forty-two and satisfies the requirements of statutory and case law.

122. Patent 5,878,434, *supra* note 110.

123. *Id.*

124. *See B. Braun Med., Inc.*, 124 F.3d at 1425 (quoting *Donaldson Co.*, 16 F.3d at 1195).

125. Patent 5,878,434, *supra* note 110.

126. *Id.*

The second issue is “whether one of skill in the art would understand the specification itself to disclose the structure, not simply whether that person would be capable of implementing that structure.”¹²⁷ This issue is important practically because one skilled in the art depends on the exact field of art that is being described. Claim forty-two of United States Patent No. 5,878,434 is about database operations.¹²⁸ Thus, the knowledge of one skilled in the art of databases would need to be examined to ensure the specification fully describes the invention. In this case, the specification describes in detail the process of the merging operation while not describing the communication between the two computers.¹²⁹ Failing to state how the two computers communicate is not critical because one skilled in the art of computers—and especially databases—would understand the specification without describing in exact detail the communication used between the two computers.

The following example is claim one of United States Patent No. 5,249,290:

1. A server apparatus for accessing one or more common resources using a plurality of server processes to which client service requests are assigned, said server apparatus comprising means for receiving an unassigned client service request request access to one of said common resources and means, responsive to a workload indication from each server process, each workload indication being less than a maximum workload for that server process, for assigning said unassigned received client service request to a server process having a workload indication which is less than the workload indication of all other server processes.¹³⁰

Claim one of United States Patent No. 5,249,290 is another example of a means-plus-function claim.¹³¹ The means-plus-function aspect of this claim is part of the server apparatus. This claim is simply an example of a means-plus-function claim and no relation to the requirements of means-plus-function claims is reviewed.

127. *Med. Instrumentation & Diagnostics Corp.*, 344 F.3d at 1212 (citing *Atmel*, 198 F.3d at 1382).

128. Patent 5,878,434, *supra* note 110.

129. *Id.*

130. Patent 5,249,290, *supra* note 100.

131. *Id.*

C. Computer-Readable Medium

Computer-readable medium claims are important because they are part of the holistic protection of software. Without computer-readable medium claims, a competitor could copy software and avoid infringement until the program was executed. With computer-readable medium claims, the patent is infringed when the program is copied onto the medium. Accordingly, computer-readable medium claims are very important to ensure the holistic protection of software. In addition, there are two subtypes of computer-readable medium claims. These two subtypes are computer program product and articles of manufacture.

"[C]omputer programs embodied in a tangible medium, such as floppy diskettes, are patentable subject matter under 35 U.S.C. § 101 and must be examined under 35 U.S.C. §§ 102 and 103."¹³² Computer-readable medium claims must relate to a functional matter that has "a useful, concrete, and tangible result."¹³³ One claim that produced "a useful, concrete, and tangible result"¹³⁴ was a "claim to data structure stored on a computer-readable medium that increases computer efficiency held statutory."¹³⁵ "When nonfunctional descriptive material is recorded on some computer-readable medium, it is not statutory since no requisite functionality is present to satisfy the practical application requirement. Merely claiming nonfunctional descriptive material stored in a computer-readable medium does not make it statutory."¹³⁶

In addition, patent practitioners should carefully draft software patent claims that utilize data structures and computer programs. "Data structures not claimed as embodied in computer-readable media are descriptive material *per se* and are not statutory because they are not capable of causing functional change in the computer."¹³⁷ "Similarly, computer programs claimed as computer listings *per se* . . . are not physical 'things.'"¹³⁸

The following example is claim thirty-one of U.S. Patent No. 5,878,434:

31. A computer-readable storage medium having a configuration that represents data and instructions which cause a first computer

132. *In re Beauregard*, 53 F.3d 1583, 1584 (Fed. Cir. 1995).

133. *See Alappat*, 33 F.3d 1526, 1544 (Fed. Cir. 1994).

134. *Id.*

135. MPEP, *supra* note 21, at 2100-12 (citing *In re Lowry*, 32 F.3d 1579, 1583-84 (Fed. Cir. 1994)).

136. *Id.*

137. *Id.* at 2100-13 (citing *In re Warmerdam*, 33 F.3d 1354, 1361 (Fed. Cir. 1994)).

138. *Id.*

and a second computer connected by a network link to perform method steps for handling clashes, the first computer and the second computer each containing a replica of a distributed database, the method comprising the steps of:

merging out a representation of operations performed on the first computer by applying at least a portion of the operations to the second replica;

merging in a representation of operations performed on the second computer by applying at least a portion of the operations to the first computer replica;

detecting persistent clashes during at least one of the merging steps; and

recovering from at least a portion of the detected persistent clashes.¹³⁹

The first issue is whether the claim produces “a useful, concrete, and tangible result.”¹⁴⁰ The computer-readable storage medium embodies a method of preventing database clashes.¹⁴¹ Thus, the method of preventing database clashes is increasing the efficiency of database operations by detecting and attempting to recover from clashes.¹⁴²

The second issue is whether the claim contains data structures or computer programs not embodied into a computer-readable storage medium. Claim thirty-one contains a computer program that is embodied in the computer-readable storage medium.¹⁴³ Thus, the computer program is not standing on its own without a hardware implementation and satisfies the requirements of patent law.

1. Computer Program Product

One subtype of a computer-readable storage medium is a computer program product. A computer program product is a medium similar to a storage medium. The following example is claim nine of United States Patent No. 6,763,397:

9. A computer program product for verifying a module of a computer program, the product comprising:
a computer readable storage medium;

139. Patent 5,878,434, *supra* note 110.

140. *Alappat*, 33 F.3d at 1544.

141. Patent 5,878,434, *supra* note 110.

142. *Id.*

143. *Id.*

computer controlling commands, stored on the computer readable storage medium, for ascertaining whether checking an instruction in a first module that is loaded requires information in a referenced module different than the first module, for determining whether the referenced module is already loaded if the information is required, for writing a constraint for the referenced module without loading the referenced module if the referenced module is not already loaded, and for verifying the instruction in the first module, the verifying comprising placing a list including a referenced type defined in a not-yet-loaded module and a different type at a fixed position in a merged snapshot.¹⁴⁴

The same issues that were addressed in a computer-readable storage medium have to be addressed in a computer program product. The first issue is whether the claim produces “a useful, concrete, and tangible result.”¹⁴⁵ The claim checks, verifies, and obtains information for a module.¹⁴⁶ This produces a result that meets the requirements because the result increases the efficiency of the machine. The second issue is whether the claim contains data structures or computer programs not embodied into a computer program product. This claim embodies the computer program into the hardware element and thus meets the requirements under the controlling case law.¹⁴⁷ Accordingly, computer program products are simply another way to write computer-readable medium claims.

2. Article of Manufacture

Another subtype of computer-readable medium claims is article of manufacture claims. This type of claim has to meet the same requirements as a computer-readable medium claim although the burden may be a little less when the article of manufacture falls under the definition of machine in § 101.¹⁴⁸ “If a claim defines a useful machine or manufacture by identifying the physical structure of the machine or manufacture in terms of its hardware or hardware and software combination, it defines a statutory product.”¹⁴⁹

144. Patent 6,763,397, *supra* note 75.

145. *Alappat*, 33 F.3d at 1544.

146. Patent 6,763,397, *supra* note 75.

147. *See* MPEP, *supra* note 21, at 2100-12.

148. 35 U.S.C. § 101 (2000).

149. MPEP, *supra* note 21, at 2100-14.

This seemingly lower burden may help in claim allowance, but the claim still has to produce “a useful, concrete, and tangible result.”¹⁵⁰

The following example is claim three of United States Patent No. 6,760,799:

3. An article of manufacture comprising a computing-device readable medium having encoded thereon instructions to direct a processor to perform the operations of:
 - queuing a first network traffic unit having an associated origin;
 - receiving a second network traffic unit having an associated origin, and receiving subsequent network traffic units each having an associated origins;
 - comparing said origins of said first and second network traffic units; and
 - if said origins differ, then queuing said second unit, else interrupting a host processor for the first unit and the second unit, and interrupting the host processor for each one of the subsequent network traffic units consecutively received after the second network traffic unit if said subsequent network traffic units are determined to be substantially received from said origin of said second network traffic unit.¹⁵¹

Claim three is similar to computer-readable medium claims because it is comprised of “a computing-device readable medium.”¹⁵² In addition, it is similar to a method claim because it is accomplishing a method on the article of manufacture.¹⁵³ This claim compares received information and retransmits if the buffers do not match.¹⁵⁴ In this regard, claim three is increasing efficiency of the transfer operation and thus produces “a useful, concrete, and tangible result.”¹⁵⁵ Accordingly, article of manufacture claims are another type of claim that can be utilized for software patents.

III. CONCLUSION

This article sets forth the reasons why patent practitioners who draft software patents should be knowledgeable about the different terminology that can be utilized in describing software technology. The three main types

150. *Alappat*, 33 F.3d at 1544.

151. Patent No. 6,760,799 (issued July 6, 2004).

152. *Id.*

153. *Id.*

154. *Id.*

155. *Alappat*, 33 F.3d at 1544.

of software claims are method claims, apparatus claims, and computer-readable medium claims. Each of these claim types has subtypes that can be utilized in properly claiming the software invention. Accordingly, there are many choices for describing the software invention, but each type of claim has its own advantages and disadvantages.

The optimum protection of software inventions comes from the use of the three main types of software claims. The use of method, apparatus, and computer-readable medium claims each have their own advantages in light of meeting the statutory and case law requirements and when used in the offensive or defensive infringement stance. Method claims are useful since most software inventions are implemented in the computer via an algorithm. Method claims describe these algorithms in an efficient way. In addition, since software inventors are familiar with algorithms, they are more likely to understand the specification describing the claims, the method claims, and the respective diagrams. Accordingly, method claims are an excellent tool in describing software inventions.

Apparatus claims are also well suited to describe software inventions since software is implemented on computer hardware devices. Since the computer hardware is an apparatus, there is a direct correlation between the apparatus that is stated and the hardware that is utilized in a software invention. Two of the subtypes of apparatus claims are types of computer hardware described in computer terminology. Means-plus-function claims are useful in software inventions because some types of means do not have a definition that is well known in the field of art, and thus the function of the means can give a better description of the component than an artificially defined word. Accordingly, apparatus claims have the benefit of being closely related to the hardware that most software inventions are implemented.

Computer-readable medium claims provide protection to software inventors to decrease the copying of patented software.¹⁵⁶ Without computer-readable medium claims, it is possible for the patented software to be copied and sold without infringement.¹⁵⁷ The only infringement with only method claims and possibly apparatus claims would occur when the software is executed, and thus the method or apparatus is infringed. With computer-readable medium claims, the copying of the claimed software will infringe the patent when the software is copied onto the computer-readable medium. Thus, computer-readable medium claims have an important protection aspect to software patents.

156. MPEP, *supra* note 21, at 2100-12.

157. *See id.*

Patent practitioners who draft software patents should utilize each of the main types of claims when drafting a software patent application. In addition, patent practitioners should pay special attention to the claim types to ensure that each of the special requirements for each type are satisfied in the specification of the patent application. For example, means-plus-function claims have to contain a disclosure of the structure in the specification.¹⁵⁸ Thus, a “structure disclosed in the specification is ‘corresponding’ structure only if the specification or prosecution history clearly links or associates that structure to the function recited in the claim.”¹⁵⁹ Accordingly, the use of the claim types necessitates an understanding of the requirements.

One commonality between all three of the main types of claims used in software patents is that the claim must have “some type of practical application, i.e., ‘a useful, concrete and tangible result.’”¹⁶⁰ In making this determination, the concern for software is not “*which* of the four categories of subject matter a claim is directed to—process, machine, manufacture, or composition of matter—but rather on the essential characteristics of the subject matter, in particular, its practical utility.”¹⁶¹ Thus, patent practitioners do not have to be concerned about fitting into the box of the four categories but must be concerned with the overall result of the claim.

In conclusion, all three types of claims are important for the protection of software patents. The use of all three together helps obtain a holistic protection mechanism for the software. This article gives an overview of the pitfalls that patent practitioners should be aware of when drafting the different types of claims. Patent practitioners who draft software patents have many issues that are of concern when drafting the patent application, but the use of all three types of claims will maximize the protection of the software.

158. B. Braun Med., Inc. v. Abbott Labs., 124 F.3d 1419, 1425 (Fed. Cir. 1997).

159. *Id.* at 1424.

160. State St. Bank & Trust Co. v. Signature Fin. Group, Inc., 149 F.3d 1368, 1373 (Fed. Cir. 1998) (quoting *In re Alappat*, 33 F.3d 1526, 1544 (Fed. Cir. 1994)).

161. *Id.* at 1375.

ARE EMPLOYEES “A” O.K.?: AN ANALYSIS OF JURISDICTIONS EXTENDING OR DENYING WARRANTY COVERAGE TO A PURCHASER’S EMPLOYEES UNDER UNIFORM COMMERCIAL CODE SECTION 2-318, ALTERNATIVE A

LAUREN FALICK*

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I. INTRODUCTION

Horizontal “privity”¹ in a breach of warranty lawsuit refers to non-purchasing plaintiffs who are outside the chain of distribution between the original seller and ultimate purchaser.² Section 2-318 of the Uniform Commercial Code (“U.C.C.”) extends warranty coverage on the sale of goods to such non-purchasing plaintiffs and permits them to sue as third-party benefi-

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1. See generally BARKLEY CLARK & CHRISTOPHER SMITH, THE LAW OF PRODUCT WARRANTIES ¶ 10.01 (1984) (defining privity as “a direct contractual relationship between plaintiff and defendant, and reflects the fact that warranty is at least partly based upon notions of contract”).

2. *Id.* at ¶ 10.01[1].

ciaries to a purchaser's warranties.³ Titled "Third Party Beneficiaries of Warranties Express or Implied," section 2-318 provides three alternatives for states to adopt and gives plaintiffs standing in a breach of warranty action.⁴ Most jurisdictions have adopted Alternative A,⁵ which limits the extension of a "seller's warranty whether express or implied . . . to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods."⁶ Since most Alternative A jurisdictions only extend warranty protection to the class of persons specifically mentioned in section 2-318, employees are generally denied beneficiary standing, because they are not among the protected class of a seller's warranties.⁷ However, the ambiguous language of Official Comment 3 to section 2-318 allows the state's judiciary to expand warranty protection beyond the enumerated list.⁸ Since Official Comment 3 to section 2-318 literally states that the section is "neutral" beyond providing warranty protection to the enumerated class, and since it permits the courts to decide emerging issues of privity, courts interpreting the section as "neutral" to extending warranty coverage beyond the pur-

3. U.C.C. § 2-318 (2001).

4. *Id.* Section 2-318 of the U.C.C. provides:

Alternative A

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

Alternative B

A seller's warranty whether express or implied extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

Alternative C

A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends.

Id.

5. 1 WILLIAM D. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES § 2-318:2 (2001). Alternative A has been adopted in . . . Alaska, Arizona, Arkansas, Connecticut, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Washington, West Virginia, and Wisconsin.

Id.

6. § 2-318.

7. Diane L. Schmauder, Annotation, *Third-Party Beneficiaries of Warranties Under UCC § 2-318*, 50 A.L.R.5th 327, 349 (1997).

8. John F. Kamin, Note, *The Extension of Implied Warranty Protection to Employees of a Purchaser*; Whitaker v. Lian Feng Machine Co., 156 Ill. App. 3d 316 509 N.E.2d 591 (1st Dist. 1987), 14 S. ILL. U. L.J. 123, 125 (1989).

chaser's family, household, and houseguests afford third-party beneficiary standing to employees.⁹

Out of all jurisdictions that have adopted Alternative A, only Florida has expanded the list of third-party beneficiaries by amending section 672.318 of the *Florida Statutes* to expressly extend warranty coverage to an "employee, servant or agent of his or her buyer."¹⁰ Since jurisdictions are split regarding whether employees should receive warranty protection under Alternative A, this article will survey and analyze various jurisdictions that afford or deny employees standing as third-party beneficiaries to their employer's warranties. Part II of this article will provide an overview of section 2-318. Part III will analyze section 2-318, Alternative A and evaluate the class of potential plaintiffs who can recover against a seller for breach of warranty. Further, Part IV will analyze section 672.318 of the *Florida Statutes*. Part V will explore the case law of jurisdictions that deny warranty coverage to employees under section 2-318, Alternative A. Part VI will present case law of jurisdictions allowing employees to recover against a seller for breach of warranties. Finally, Part VII will evaluate whether employees should be considered third-party beneficiaries under Alternative A and offer solutions to bring uniformity among the jurisdictions.

II. OVERVIEW OF U.C.C. SECTION 2-318

The original version of section 2-318 was enacted in 1952 and provided warranty protection for the buyer's family, household, and house guests.¹¹ The purpose of the U.C.C. was "to make uniform the law among the various jurisdictions."¹² However, the states viewed this version as a limitation on the realm of potential plaintiffs who could sue a seller for breach of warranties.¹³ As a result, many states adopted their own versions and variations of section 2-318.¹⁴ In response to the states' rampant opposition and changes to section 2-318, the drafters of the section amended section 2-318 in 1966 to offer the states three alternatives.¹⁵ The 1952 version became Alternative A, Alternative B was added to extend the class of potential plaintiffs beyond the enumerated class in Alternative A, and Alternative C was added for an even more liberal approach to allow non-privity plaintiffs to sue as third-party

9. § 2-318 cmt. 3.

10. FLA. STAT. § 672.318 (2004).

11. CLARK & SMITH, *supra* note 1, at ¶ 10.01[2][b].

12. 1 HAWKLAND, *supra* note 5, at § 2-318:1.

13. *Id.*

14. *Id.*

15. § 2-318.

beneficiaries of warranties.¹⁶ Official Comment 2 to section 2-318 was added to illustrate the drafter's intent and stated:

The purpose of this section is to give certain beneficiaries the benefit of the same warranty which the buyer received in the contract of sale, thereby freeing any such beneficiaries from any technical rules as to "privity." It seeks to accomplish this purpose without any derogation of any right or remedy resting on negligence. It rests primarily upon the merchant-seller's warranty¹⁷ under this Article that the goods sold are merchantable and fit for the ordinary purposes for which such goods are used rather than the warranty of fitness for a particular purpose.¹⁸ Implicit in the section is that any beneficiary of a warranty may bring a direct action for breach of warranty against the seller whose warranty extends to him.¹⁹

Although code commentaries are not authoritative law for courts to apply, they are both helpful and compelling when construing the provisions.²⁰ Official Comment 3 to section 2-318 addresses the privity issue by stating:

The first alternative expressly includes as beneficiaries within its provisions the family, household and guests of the purchaser. Beyond this, the section in this form is neutral and is not intended to

16. *Id.*

17. U.C.C. section 2-314 provides:

- (1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind
- (2) Goods to be merchantable must be at least such as
 - (a) pass without objection in the trade under the contract description; and
 - (b) in the case of fungible goods, are of fair average quality within the description; and
 - (c) are fit for the ordinary purposes for which such goods are used; and
 - (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
 - (e) are adequately contained, packaged, and labeled as the agreement may require; and
 - (f) conform to the promises or affirmations of fact made on the container or label if any.
- (3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

§ 2-314.

18. U.C.C. section 2-315 provides:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under [section 2-316] an implied warranty that the goods shall be fit for such purpose.

§ 2-315.

19. § 2-318 cmt. 2.

20. Kamin, *supra* note 8.

enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain.²¹ The second alternative is designed for states where the case law has already developed further and for those that desire to expand the class of beneficiaries. The third alternative goes further, following the trend of modern decisions as indicated by Restatement of Torts 2d § 402A . . . in extending the rule beyond injuries to the person.²²

Alternative A limits the class of persons who can be in "horizontal privity"²³ but leaves issues of "vertical privity"²⁴ for the courts to determine on a case-by-case basis.²⁵ Alternative B eliminates both horizontal and vertical privity in regard to "natural person[s] who may reasonably be expected to use, consume or be affected by the goods and who [are] injured in person by breach of the warranty."²⁶ Alternative C takes an even more liberal approach by affording warranty protection to "any person who may reasonably be expected to use, consume or be affected by the goods" and allowing recovery for pure economic loss.²⁷ In adopting one of the alternatives provided by section 2-318, a state's legislature has established its sphere of horizontal privity.²⁸

III. ANALYSIS OF ALTERNATIVE A

Recall that Alternative A states:

21. See § 2-103. The term "distributive chain" is not defined in § 2-103. *Id.* Therefore, it is unclear whether "distributive chain" refers to those who are in vertical or horizontal privity with the buyer. William L. Stallworth, *An Analysis of Warranty Claims Instituted by Non-Privity Plaintiffs in Jurisdictions That Have Adopted Uniform Commercial Code Section 2-318 (Alternative A)*, 20 PEPP. L. REV. 1215, 1258 (1993).

22. § 2-318 cmt. 3 (1999).

23. 3A LARY LAWRENCE, ANDERSON ON THE UNIFORM COMMERCIAL CODE, 324 (3d ed. 2002). "'Horizontal privity' addresses the issue as to whether a seller is liable to persons, other than the buyer, who use the goods." *Id.*

24. 63 AM. JUR. 2D *Products Liability* § 742 (1996). Vertical privity "includes all parties in the distributive chain from the initial supplier of the product to the ultimate purchaser." *Id.*

25. 3A LAWRENCE, *supra* note 23. See generally *Whitaker v. Lian Feng Mach. Co.*, 509 N.E.2d 591 (Ill. App. Ct. 1987).

26. § 2-318, Alternative B.

27. § 2-318, Alternative C. "[I]n a products-liability suit, economic loss includes the cost of repair or replacement of defective property, as well as commercial loss for the property's inadequate value and consequent loss of profits or use." BLACK'S LAW DICTIONARY 228 (2d Pocket ed. 2001).

28. See *Teel v. Am. Steel Foundries*, 529 F. Supp. 337, 345 (E.D. Mo. 1981).

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.²⁹

Alternative A limits the class of potential plaintiffs in five ways.³⁰ First, the section only extends warranty protection to "natural persons."³¹ This means that corporations, partnerships, and businesses cannot recover under Alternative A.³² Second, the section only allows recovery if the plaintiff sustains a personal injury.³³ Therefore, non-purchasing plaintiffs cannot recover under Alternative A if they only sustained an economic loss. Third, the language of Alternative A limits the class of non-privity plaintiffs to those who are in the buyer's family, household, or guests in his home.³⁴ In adopting Alternative A, a state's legislature indicates an intention to only extend warranty coverage to the limited classes included in the statute.³⁵ Therefore, a buyer's employees are not likely to recover in an Alternative A jurisdiction since they are not among the third-party beneficiaries contemplated by the drafters of the Code. Fourth, Alternative A limits the class of defendants to direct sellers by expressly stating that the seller's warranty extends to any natural person "of his buyer."³⁶ However, Official Comment 3 has been interpreted to give courts the discretion to resolve issues of vertical privity and expand the potential class of defendants.³⁷ Further, the last sentence of Alternative A, stating that "[a] seller may not exclude or limit the operation of this section,"³⁸ forbids the "exclusion of liability by the seller to the persons to whom the warranties which he has made to his buyer would extend under this section."³⁹ Finally, Alternative A narrows the class of potential plaintiffs by only allowing the enumerated class to recover if it is

29. § 2-318, Alternative A.

30. 1 HAWKLAND, *supra* note 5, at 2-318:1, 2-318:2.

31. *Id.* at § 2-318:1.

32. *Id.* at § 2-318:2.

33. *Id.*

34. *Id.*

35. AM. LAW OF PROD. LIAB. 3d § 21:12 (1987).

36. § 2-318, Alternative A.

37. *See Groppe Co. v. United States Gypsum Co.*, 616 S.W.2d 49, 57-58 (Mo. Ct. App. 1981).

38. § 2-318, Alternative A.

39. § 2-318 cmt. 1.

"reasonable to expect that such person may use, consume or be affected by the goods."⁴⁰

A prevalent discrepancy among Alternative A jurisdictions is whether warranty coverage should expand beyond the list of persons expressly included in the text of Alternative A.⁴¹ A compelling justification for this discrepancy is found in the ambiguous language of Official Comment 3.⁴² The problematic language of Official Comment 3 that leads courts to different interpretations is as follows:

The first alternative expressly includes as beneficiaries within its provisions the family, household and guests of the purchaser. Beyond this, the section in this form is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain.⁴³

Jurisdictions that take a strict construction approach to interpreting section 2-318 only extend warranty protection to the purchaser's family, household, and guests since "adoption of Alternative A by the legislature indicates a conscious decision to limit the seller's liability for breach of warranty to the specific classes enumerated therein."⁴⁴ These jurisdictions interpret Official Comment 3 "as an exhaustive list of the non[-]purchasers whom the drafters have freed from the privity requirement."⁴⁵ Therefore, in giving such a narrow reading of the section, these jurisdictions have held that neither employees⁴⁶ nor innocent bystanders⁴⁷ can recover as third-party beneficiaries to a seller's warranty.

40. § 2-318, Alternative A. See *McBurnette v. Playground Equip. Corp.*, 137 So. 2d 563, 566-67 (Fla. 1962) (holding that a minor who was injured on playground equipment purchased by his father was "a naturally intended and reasonably contemplated beneficiary of the warranty of fitness for use or merchantability implied by law" since the father purchased the equipment for the son's use).

41. Stallworth, *supra* note 21, at 1257.

42. *Id.*

43. § 2-318 cmt. 3.

44. 63 AM. JUR. 2D *Products Liability* § 751 (1996).

45. Stallworth, *supra* note 21, at 1257.

46. 3A LAWRENCE, *supra* note 23, at 344. Employees are protected under both Alternative B and Alternative C if it is reasonable to expect the employee to "use, consume or be affected by the goods" since Alternative B extends this coverage to any natural person and Alternative C extends such coverage to anyone. *Id.* at 324. Therefore, privity of contract between the employer and those in vertical distribution is irrelevant in jurisdictions adopting Alternatives B or C, and employees are generally deemed third-party beneficiaries. *Id.* at 326.

47. See *Crews v. W.A. Brown & Son, Inc.*, 416 S.E.2d 924, 930-31 (N.C. Ct. App. 1992) (holding a church member, who was injured while trapped inside a freezer in the church, was

In contrast to the strict construction approach, jurisdictions relying on the phrase “[b]eyond this, the section in this form is neutral” of Official Comment 3⁴⁸ have held “the coverage of UCC [section] 2-318 may be expanded beyond that adopted by the legislature.”⁴⁹ Since the phrase “[b]eyond this” could be interpreted to refer to the purchaser’s family, household, and guests, the “neutral” clause could mean the Code is impartial to expanding the class of plaintiffs who can qualify for warranty protection further than the enumerated list.⁵⁰ Therefore, Official Comment 3 could be interpreted to mean the buyer’s family members, household, and houseguests are the minimum class of non-privity plaintiffs who are afforded warranty protection, but developments in case law will not limit the expansion of horizontal privity.⁵¹ Additionally, the Code’s failure to define the term “distributive chain” in section 2-103⁵² creates an ambiguity as to whether the section is “neutral” in expanding vertical or horizontal privity.⁵³ Employees have also been denied standing in a warranty action if their injuries were covered by worker’s compensation⁵⁴ or if the court dismissed their action because they could recover under the theories of negligence or strict tort liability.⁵⁵

not entitled to maintain a breach of implied warranty cause of action because plaintiff was neither a member of the church’s “family,” “household,” or a guest in the church’s home since a church is not considered a home and does not have a “family” or “household”).

48. § 2-318 cmt. 3.

49. 63 AM. JUR. 2D *Products Liability* § 752 (1996). See *Quadrini v. Sikorsky Aircraft Div.*, 505 F. Supp. 1049, 1052 (D. Conn. 1981). The *Quadrini* panel stated: “This court is not persuaded that the adoption of Alternative A . . . evinces a clear legislative intent to preclude all other persons but those in the family, household, or a guest from seeking warranty coverage.” *Id.* This holding was especially accurate in light of an amendment to U.C.C. section 2-318 when the court stated “[t]his section is neutral with respect to case law or statutory law extending warranties for personal injuries to other persons.” *Id.* (citing CONN. GEN. STAT. § 42a-2-318 (1996)).

50. Walter K. Swartzkopf, Note, *Products Liability: Employees and the Uniform Commercial Code, Section 2-318*, 68 DICK. L. REV. 444, 451 (1964).

51. *Id.*

52. § 2-103 (1999).

53. Stallworth, *supra* note 21, at 1258.

54. See *Sutton v. Major Prods. Co.*, 372 S.E.2d 897, 899 (N.C. Ct. App. 1988).

55. See *Hester v. Purex Corp.*, 534 P.2d 1306, 1308 (Okla. 1975). Strict tort liability in a products liability action is governed by RESTATEMENT (SECOND) OF TORTS § 402A, which provides:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

- (a) the seller is engaged in the business of selling such a product, and
- (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

IV. ANALYSIS OF SECTION 672.318 OF THE *FLORIDA STATUTES*

Out of the twenty-nine jurisdictions that have adopted Alternative A, only Florida has expressly expanded the enumerated class of Alternative A to include employees in section 672.318 of the *Florida Statutes*.⁵⁶ Section 672.318 provides:

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his or her buyer, who is a guest in his or her home or who is an employee, servant or agent of his or her buyer if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude nor limit the operation of this section.⁵⁷

Although section 672.318 extends warranty coverage beyond the buyer's family, household, or houseguests, issues of privity regarding plaintiffs who are not expressly included in the statute are still decided on "a case by case basis after a thorough analysis of the facts and considering what would be a natural expansion of the law in this area."⁵⁸ Like other jurisdictions that have adopted Alternative A, Florida courts rely on the Official Code Comments of section 2-318 in considering whether privity should be extended beyond the enumerated class.⁵⁹ Just as Alternative A only provides warranty coverage to natural persons who have sustained a personal injury, section 672.318 also denies corporations, businesses, or partnerships who have suffered an economic loss the ability to sue as third-party beneficiaries of contracts.⁶⁰ Finally, the non-purchasing plaintiff must be a foreseeable

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- (a) the seller has exercised all possible care in the preparation and sale of his product, and
 - (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1965).

56. FLA. STAT. § 672.318 (2004); See generally STATE U.C.C. VARIATIONS, U.C.C. REP. SERV. (West 1998).

57. § 672.318.

58. *Barry v. Ivarson Inc.*, 249 So. 2d 44, 46 (Fla. 2d Dist. Ct. App. 1971) (holding lessees of a residence who were injured by a table in that residence purchased by the lessors from the defendant were not third-party beneficiaries since lessees were "not within the category of third-party beneficiaries as contemplated in [Florida Statutes] § 672.318" and "there [was] a question of foreseeability").

59. *Id.*

60. *See Downriver Internists v. Harris Corp.*, 929 F.2d 1147, 1150 (6th Cir. 1991) (holding a partnership was not a third-party beneficiary of contracts under Florida law and could not recover economic damages for breach of warranty).

user of the product to recover as a third-party beneficiary to a seller's warranties.⁶¹

V. CASE LAW: JURISDICTIONS DENYING EMPLOYEES WARRANTY COVERAGE

Not only are jurisdictions split regarding the issue of whether a purchaser's employees should qualify as third-party beneficiaries to their seller's warranties, but the courts differ regarding why this issue should be answered in the negative. In *Teel v. American Steel Foundries*,⁶² the court, in applying Missouri law, used a strict construction approach to Missouri's Alternative A statute and held that an employee was neither in privity with the employer's seller, nor within the class of enumerated persons the statute intended as a third-party beneficiary.⁶³ The court in *Hester v. Purex Corp.*⁶⁴ used legislative intent for adopting Alternative A instead of Alternatives B or C, which bars issues of horizontal privity altogether, and denied employees standing as third-party beneficiaries to their employers' warranties.⁶⁵ The *Hester* court further held that employees are not without a remedy and could recover under the theories of negligence or strict tort liability.⁶⁶ Further, the court in *Sutton v. Major Products Co.*⁶⁷ held that a grocery store employee was barred from bringing a breach of warranty suit against a manufacturer because she was covered under worker's compensation insurance.⁶⁸

A. *Teel v. American Steel Foundries*

The court in *Teel* faced an issue of first impression—specifically, whether horizontal privity can be expanded beyond the buyer's family members, household, or houseguests, in Missouri.⁶⁹ The plaintiff in *Teel* was injured when a defective wheel on the tractor he was operating disengaged the trailer from the tractor, causing him to lose control and crash.⁷⁰ Consequently, he sued to recover as a third-party beneficiary to the contracts between his employer and the seller of the tractor containing the defective wheel, and be-

61. *McCarthy v. Fla. Ladder Co.*, 295 So. 2d 707, 709 (Fla. 2d Dist. Ct. App. 1974).

62. 529 F. Supp. 337 (E.D. Mo. 1981).

63. *Id.* at 345–46.

64. 534 P.2d 1306 (Okla. 1975).

65. *Id.* at 1308.

66. *Id.*

67. 372 S.E.2d 897 (N.C. Ct. App. 1988).

68. *Id.* at 899.

69. *Teel*, 529 F. Supp at 345.

70. *Id.* at 340.

tween his employer and the manufacturer of the wheel.⁷¹ The defendants moved to dismiss due to lack of privity.⁷²

Missouri's Legislature has adopted Alternative A verbatim in creating section 400.2-318 of the Missouri Statutes, which "allows recovery to a very limited class of non-privity parties."⁷³ The plaintiff insisted that the court ignore the privity issue and follow the decision in *Groppel Co. v. United States Gypsum Co.*,⁷⁴ where a remote purchaser was able to recover against a manufacturer based on implied warranties.⁷⁵ The plaintiff in *Groppel Co.* sued the manufacturer of a fireproofing material and a company that inspected and approved the product in their published bulletin for economic losses resulting from extra time and costs spent on re-applying the material to a building.⁷⁶ After reasoning that Official Comment 3 of section 2-318 allows the courts to make an exception to the privity requirement, the court in *Groppel Co.* noted that other jurisdictions interpreting Alternative A have held:

[T]he statute speaks only about "horizontal privity" (who, besides the purchaser, has a right of action against the manufacturer or seller of a defective product), and is silent on the question of "vertical privity" (who, besides the immediate seller, is liable to the consumer for damages caused by the defective product) . . . [t]here thus is nothing to prevent this court from joining in the growing number of jurisdictions which, although bound by the code, have nevertheless abolished vertical privity in breach of warranty cases.⁷⁷

Based upon such reasoning, the court in *Groppel Co.* held that implied warranties could extend to remote purchasers.⁷⁸

Since *Groppel Co.* decided an issue of vertical privity in extending warranty protection to remote purchasers, and not an issue of horizontal privity, the court in *Teel* ignored the plaintiff's contention and held that *Groppel Co.* was not authoritative in deciding whether a seller's warranties should extend

71. *Id.* at 344.

72. *Id.* at 343.

73. *Teel v. Am. Steel Foundries*, 529 F. Supp. 337, 344 (E.D. Mo. 1981) (referring to family members, household members and houseguests of the buyer).

74. 616 S.W.2d 49 (Mo. Ct. App. 1981).

75. *Id.* at 58.

76. *Id.* at 53-54.

77. *Id.* at 57-58 (quoting *Kassab v. Cent. Soya*, 246 A.2d 848, 855 (Pa. 1968)).

78. *Id.* at 58.

to non-purchasers who are not enumerated in Alternative A.⁷⁹ Since “Missouri courts have never specifically interpreted section 2-318 with regard to the class of persons who may be considered in horizontal privity with the seller,” there was no established case law addressing whether a purchaser’s employee can recover as a third-party beneficiary under section 2-318, Alternative A.⁸⁰ Without governing case law, the court looked to other factors indicating legislative intent to resolve the issue.⁸¹

Based upon the express language of section 400.2–318 extending warranty protection to the buyer’s family, household members, or guests in his home, the court found “nothing in the express wording of this section to indicate that an employee of a buyer may benefit from the seller’s warranty.”⁸² The court then looked to the Official Comment of section 400.2–318⁸³ and found it “clearly expresses a legislative intent to limit the class of third party beneficiaries of the seller’s warranty to the class of persons specifically enumerated in the statute.”⁸⁴ Further, the court held “the very fact that the Missouri legislature enacted Alternative A, rather than the more expansive Alternatives B or C provides further indicia of this intent.”⁸⁵ Finally, the court looked to other jurisdictions that adopted Alternative A to prevent employees from recovering for injuries caused by a product purchased by their employer.⁸⁶ Ultimately, the court held “the express wording of § 400.2–318 and the legislative intent implied by the comments to the statute must control. Had the Missouri legislature intended broader coverage by the UCC they

79. *Groppe Co.*, 616 S.W.2d at 58; *Teel v. Am. Steel Foundries*, 529 F. Supp. 337, 345 (E.D. Mo. 1981).

80. *Teel*, 529 F. Supp. at 345.

81. *Id.*

82. *Id.*

83. *Id.* The Comment states: “Missouri courts have required privity in warranty cases which involve goods other than food and drink. The food and drink decisions are distinguished on the basis of the nature of the product and do not depend upon a family or household relationship between the injured person and the purchaser.” *Id.* (quoting MO. REV. STAT. ANN. § 400.2–318 (1965)).

84. *Teel v. Am. Steel Foundries*, 529 F. Supp. 337, 345 (E.D. Mo. 1981)

85. *Id.*

86. *Id.* (citing *Weaver v. Ralston Motor Hotel, Inc.*, 218 S.E.2d 260, 262–263 (Ga. Ct. App. 1975); *Hester v. Purex Corp.*, 534 P.2d 1306, 1308 (Okla. 1975); *Colvin v. FMC Corp.*, 604 P.2d 157, 160 (Or. Ct. App. 1979)). The court also quoted the Supreme Court of New Jersey’s interpretation of § 2–318, Alternative A, which stated:

[I]t is not the duty of the courts to amend the statute where the Legislature has spoken. Therefore, under New Jersey law the statutory breach of warranty claims would not be available to [defendant] or to any party other than the contract purchaser, or the limited class set forth in § 2–318.

Teel, 529 F. Supp. at 345 (quoting *Monsanto Co. v. Alden Leeds, Inc.*, 326 A.2d 90, 95 (N.J. Super. Ct. Law Div. 1974)).

could have enacted either Alternative B or C to § 2-318."⁸⁷ The plaintiff was held to not be in privity with the defendants and was deprived of the ability to bring a breach of warranty action.⁸⁸

B. Hester v. Purex Corp.

In *Hester v. Purex Corp.*, the appellant sustained permanent injuries to his central nervous system after inhaling fumes of a cleaning solvent during the course of his employment.⁸⁹ Due to his injuries, the appellant sued the manufacturer of the solvent that sold the product to his employer.⁹⁰ The appellant maintained that the manufacturer breached the implied warranty of merchantability because the cleaning solvent was not fit and safe for its intended purpose of cleaning.⁹¹ The trial court granted defendant's motion to dismiss and plaintiff appealed.⁹² The issue on appeal was whether warranty protection extends to the purchaser's employees.⁹³ The appellant sought to magnify the language of Official Comment 3 to section 2-318, which states: "the section is neutral and is not intended to enlarge or restrict the developing case law."⁹⁴ Based on the Official Comment, the appellant's position was that "section 2-318 should be construed liberally so as to include any foreseeable or intended users such as employees of the buyer."⁹⁵ To support his contention, he argued "that an employee is a member of the 'business family or household'"⁹⁶ as established in *Speed Fasteners, Inc. v. Newsom*.⁹⁷

In *Newsom*, the jury awarded the appellee-plaintiff damages for injuries sustained from an industrial incident when the shank of a stud being attached to wood by a fellow workman ricocheted through the wood and hit the plaintiff in the head while he was working as a carpenter foreman.⁹⁸ The plaintiff brought suit against the manufacturer of the stud on the theories of breach of express and implied warranties.⁹⁹ There was no privity issue regarding the

87. *Teel*, 529 F. Supp. at 345.

88. *Id.* at 345-46.

89. *Hester v. Purex Corp.*, 534 P.2d 1306, 1307 (Okla. 1973).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Hester*, 534 P.2d at 1308 (quoting 12A O.S. 1971 § 2-318 cmt. 3) (current version at OKLA. STAT. tit. 12A, § 2-318 (2004)).

95. *Id.*

96. *Id.*

97. 382 F.2d 395 (10th Cir. 1967).

98. *Id.* at 396.

99. *Id.*

breach of express warranty since the plaintiff had read pamphlets describing the studs, and therefore representations regarding the studs were made directly to him.¹⁰⁰ However, the express warranty claim was dismissed because the plaintiff did not buy the studs, and there is nothing in the record proving the employer “relied on any statement in the pamphlet” when purchasing the studs.¹⁰¹ As to the breach of implied warranty claim, the court in *Newsom* held an “employee stands in the shoes of his employer and that his cause of action based on implied warranty is not barred by the shield of privity.”¹⁰² The court reasoned that manufacturers are aware of the fact that purchaser’s employees will use the product since most business activities are performed by employees.¹⁰³ Without an Oklahoma case proving otherwise, the court was “satisfied that the employee may sue on the theory of implied warranty.”¹⁰⁴ The court relied on expert testimony proving the separation of the head from the shank of the stud was due to a manufacturing defect¹⁰⁵ causing that stud to become weaker.¹⁰⁶ The court found enough evidence to find the manufacturer liable based on the theory of manufacturer’s liability.¹⁰⁷

Since *Newsom* was decided on a theory of products liability, the court in *Hester* dismissed the appellant’s contention because “[t]he UCC has to do with commercial transactions and presupposes a buyer in privity with a seller, the concept being extended only as provided by the Legislature.”¹⁰⁸ Since Oklahoma has adopted Alternative A, and has not adopted Alternatives B or C to expand the realm of warranty coverage, the court held a purchaser’s employees were not protected under section 2-318 until the legislature changes the statute.¹⁰⁹ However, the court reasoned that injured employees could still maintain a cause of action and recover under the theories of negligence and strict products liability.¹¹⁰

100. *Id.* at 397.

101. *Id.*

102. *Newsom*, 382 F.2d at 398.

103. *Id.*

104. *Id.*

105. *Id.* at 399. A manufacturing defect is “[a]n imperfection in a product that departs from its intended design even though all possible care was exercised in its assembly and marketing.” BLACK’S LAW DICTIONARY 450 (8th ed. 2004).

106. *Newsom*, 382 F.2d at 399.

107. *Id.*

108. *Hester v. Purex Corp.*, 534 P.2d 1306, 1308 (Okla. 1975) (quoting *Moss v. Polyco, Inc.*, 522 P.2d 622, 625 (Okla. 1974)).

109. *Id.*

110. *Id.* See generally *Kirkland v. G.M. Corp.*, 521 P.2d 1353 (Okla. 1974).

C. Sutton v. Major Products Co.

In *Sutton v. Major Products Co.*,¹¹¹ a grocery store employee appealed a summary judgment entered in favor of a manufacturer and distributors of a potato whitener containing sodium bisulfate.¹¹² Plaintiff brought a cause of action alleging breach of implied warranty of merchantability against both the manufacturer and distributors of the potato whitener for injuries sustained from inhaling the noxious fumes of the whitener.¹¹³ However, section 99B-2(b) of the General Statutes of North Carolina lists as a claimant for a breach of implied warranty of merchantability "a buyer, a member or guest of a member of the family of the buyer, a guest of the buyer, or an employee of the buyer not covered by worker's compensation insurance."¹¹⁴ Therefore, the potential class of plaintiffs who can sue a manufacturer for breach of implied warranty of merchantability is limited.¹¹⁵ The court interpreted the statute to restrict the class of potential plaintiffs in a products liability action against those in the vertical chain of distribution for breach of implied warranties.¹¹⁶ Here, the plaintiff's employer purchased the product for use in the store; the plaintiff used the whitener during the course of her employment; and the plaintiff's injury was covered under the Worker's Compensation Act.¹¹⁷ Therefore, she was barred from bringing a breach of implied warranty action against the defendants, and the court upheld the summary judgment in favor of the manufacturer.¹¹⁸

VI. CASE LAW: JURISDICTIONS EXTENDING WARRANTY PROTECTION TO EMPLOYEES

Just as jurisdictions deny employees warranty coverage under section 2-318, Alternative A for various reasons, jurisdictions are also split concerning why employees should have standing to sue as third-party beneficiaries to a seller's warranties.¹¹⁹ In *Whitaker v. Lian Feng Machine Co.*,¹²⁰ the court

111. 372 S.E.2d 897 (N.C. Ct. App. 1988).

112. *Id.* at 898.

113. *Id.*

114. N.C. GEN. STAT. § 99B-2(b) (2003); *Sutton*, 372 S.E.2d at 899.

115. *See Sutton*, 372 S.E.2d at 899.

116. *Id.*

117. *Id.*

118. *Id.*

119. *See e.g.*, *Carlson v. Armstrong World Indus., Inc.*, 693 F. Supp. 1073 (S.D. Fla. 1987); *Whitaker v. Lian Feng Mach. Co.*, 509 N.E.2d 591 (Ill. App. Ct. 1987); *McNally v. Nicholson Mfg. Co.*, 313 A.2d 913 (Me. 1973).

120. 509 N.E.2d 591 (Ill. App. Ct. 1987).

interpreted Official Comment 3 to allow the judiciary to decide issues of horizontal privity and extend warranty coverage beyond the enumerated class of Alternative A.¹²¹ However, the court conditioned its extension of privity by only extending third-party beneficiary standing to a purchaser's employees if the employee's safety in using the goods formed part of the basis of the bargain between the employer and seller.¹²² In *McNally v. Nicholson Manufacturing Co.*,¹²³ the Supreme Court of Maine interpreted the Official Comment to section 2-313 and analyzed section 2-318 to establish that courts have the power to resolve issues of horizontal privity and extend warranty protection beyond the enumerated class of Alternative A.¹²⁴ Further, the court reasoned that employees of a corporate purchaser qualify as members of the corporate "family," thus allowing them to fall within the protected class of warranty beneficiaries.¹²⁵ In *Carlson v. Armstrong World Industries, Inc.*,¹²⁶ an employee was able to bring a breach of warranty action against a manufacturer because the language of section 672.318 of the *Florida Statutes* expressly includes employees within the enumerated class of intended third-party beneficiaries.¹²⁷

A. *Whitaker v. Lian Feng Machine Co.*

In *Whitaker*, an employee brought suit to recover for injuries sustained during the course of his employment while working with a bandsaw that was purchased by his employer.¹²⁸ The plaintiff sought to recover against the manufacturer, importer, and seller of the bandsaw for breach of implied warranties of merchantability and fitness for a particular purpose.¹²⁹ The plaintiff's complaint alleged that the defendants knew his employer bought the bandsaw to cut bar stock.¹³⁰ After the trial court granted both the importer's and seller's motions to dismiss the breach of warranties claims due to the plaintiff's lack of privity, the plaintiff appealed.¹³¹

The issue on appeal, which had not been specifically ruled on below, was whether an ultimate purchaser's employee could recover from the seller

121. *Id.* at 594.

122. *Id.* at 595.

123. 313 A.2d 913 (Me. 1973).

124. *Id.* at 919–20.

125. *Id.* at 921.

126. 693 F. Supp. 1073 (S.D. Fla. 1987).

127. *Id.* at 1077.

128. *Whitaker*, 509 N.E.2d at 592.

129. *Id.*

130. *Id.*

131. *Id.*

for breach of warranty.¹³² The defendants argued that the plaintiff was not among the class of intended beneficiaries enumerated in Alternative A.¹³³ The court responded by stating that the enumerated class of Alternative A is not a limitation on potential plaintiffs since the language and commentary of section 2-318 proves "that the requirement of privity between the purchaser and remote manufacturer is not established."¹³⁴ The defendants argued section 2-318 restricts those in horizontal privity from recovering for breach of warranty but does not affect those in vertical privity.¹³⁵ Further, the defendants stated the Illinois Legislature's decision to adopt Alternative A establishes their intention to deny employees the right to recover as third-party beneficiaries to a seller's warranties made to their employer, since employees "would clearly be allowed to recover for breach of warranty under alternatives B and C."¹³⁶

Relying on Official Comment 3 to section 2-318, the court held the statute was not restricted by developing case law concerning issues of horizontal privity.¹³⁷ Additionally, the court relied on the Official Comment to section 2-313¹³⁸ and found "the 'purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell . . . and to hold the seller liable if he has failed to supply goods of the agreed upon quality.'¹³⁹

132. *Id.* at 592.

133. *Whitaker*, 509 N.E.2d at 593. The defendants relied on *In re Johns-Manville Asbestosis Cases*, 511 F. Supp. 1235, 1239-40 (N.D. Ill. 1981) (holding that Illinois courts have not allowed a plaintiff who is outside the class of persons enumerated within section 2-318 the right to recover for breach of warranty) and *Hemphill v. Sayers*, 552 F. Supp. 685, 693 (S.D. Ill. 1982) (holding that a plaintiff cannot recover as a functional equivalent to family members or guests, and the legislature's adoption of the most narrowly worded alternative proves their intent to bar such plaintiffs from recovery). *Id.*

134. *Id.* (quoting *Berry v. G.D. Searle & Co.*, 309 N.E.2d 550, 556 (Ill. 1974)).

135. *Id.*

136. *Id.* at 593-94.

137. *Whitaker*, 509 N.E.2d at 594.

138. U.C.C. section 2-313 provides:

(1) Express warranties by the seller are created as follows:

- (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
- (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
- (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

U.C.C. § 2-313 (2001).

139. *Whitaker*, 509 N.E.2d at 594 (quoting § 2-313 cmt. 4).

The court then explained that a seller expressly warrants if he makes “any affirmation of fact or promise . . . to the buyer which relates to the goods and becomes part of the basis of the bargain.”¹⁴⁰ The court reasoned that section 2-318 creates a conclusive presumption that a purchaser who bargained for a warranty of safety sought the warranty on behalf of himself and the enumerated class of third-party beneficiaries “if it is reasonable to expect that such person may use, consume or be affected by the goods.”¹⁴¹ Therefore, both express and implied warranties were found to form “part of the basis of any bargain in the trade.”¹⁴² Thus, the court held:

[T]he warranty extends to any employee of a purchaser who is injured in the use of the goods, as long as the safety of that employee in the use of the goods was either explicitly or implicitly part of the basis of the bargain when the employer purchased the goods.¹⁴³

In applying the facts of the case, the court held that the bandsaw the plaintiff’s employer bought from defendants did not conform to its implied warranty of merchantability or its implied warranty of fitness for a particular purpose.¹⁴⁴ In bargaining for a safe, merchantable bandsaw, the plaintiff’s employer “sought the safety on behalf of its employees who were to use the saw [since a] corporation cannot use the bandsaw at all unless its employees operate it.”¹⁴⁵ Therefore, the court held the defendants either expressly or impliedly warranted that the bandsaw was safe for the plaintiff’s use, thus enabling the plaintiff to bring an action for breach of warranty.¹⁴⁶

B. McNally v. Nicholson Manufacturing Co.

In *McNally v. Nicholson Manufacturing Co.*,¹⁴⁷ the Supreme Court of Maine relied on policy arguments and its interpretation of official code comments in holding that an employee who was required to be in close proximity of a machine during the course of his employment was a beneficiary of

140. *Id.* The court quoted ILL. REV. STAT. § 2-313 (1985), which was replaced by 810 ILL. COMP. STAT. ANN. 5/2-313(a) (1993).

141. *Id.* at 595 (quoting ILL. REV. STAT. 1985 Ch. 26, ¶ 2-318 (current version at 810 ILL. COM. STAT. 5/2-318 (2004))).

142. *Id.*

143. *Id.*

144. *Whitaker*, 509 N.E.2d at 595.

145. *Id.*

146. *Id.*

147. 313 A.2d 913 (Me. 1973).

the warranties given to his employer by a manufacturer.¹⁴⁸ The plaintiff was injured during the course of his employment while operating a skidder, which transfers logs into a chipping machine that grinds them into chips used for making pulp and paper.¹⁴⁹ Plaintiff brought a breach of warranty action against the manufacturer of the skidder due to injuries sustained from a piece of wood forcefully flying out of a side opening and striking him in the head.¹⁵⁰ The plaintiff alleged the defendant's publication, advertising, and interviews created an express warranty to the plaintiff's employer since the skidder was represented to be safely made for its intended purpose.¹⁵¹ Plaintiff further alleged the defendant created the implied warranty of merchantability by selling the chipper to his employer.¹⁵² However, the superior court granted defendant's motion to dismiss for failure to state a claim for which relief can be granted because the plaintiff, as the purchaser's employee, was not in privity of contract with the defendant.¹⁵³

In reversing the ruling of the lower court, the Supreme Court of Maine first noted the trend of other jurisdictions that relaxed or deserted privity requirements in a breach of warranty action.¹⁵⁴ This was the first case to come before the court on the issue of horizontal privity, which had "no intervening attention to the problem by the Maine Legislature."¹⁵⁵ The court analyzed the differences between vertical and horizontal privity, and found:

These "horizontal" relationships to the last purchaser were described in Section 2-318 in terms of: (1) a "natural person" "injured in [his] person by breach of the warranty", (2) who is "in the family or household" or "a guest in . . . [the] home" of the last purchaser and (3) who "it is reasonable to expect" is a "person [who] may use, consume or be affected by the goods . . ."¹⁵⁶

Except for being a member of the ultimate purchaser's family, household, or a houseguest of the ultimate purchaser, the court found the plaintiff met the criteria required to bring a breach of warranty action under section 2-318, since he was a natural person who was personally injured and it was

148. *Id.* at 921.

149. *Id.* at 914.

150. *Id.*

151. *Id.*

152. *McNally*, 313 A.2d at 914.

153. *Id.* at 916.

154. *Id.* at 916-17.

155. *Id.* at 917.

156. *Id.* at 918 (quoting U.C.C. § 2-318 (1999)) (alteration in original).

reasonable to expect for him to use or be affected by the machine.¹⁵⁷ Therefore, the issue on appeal was whether the section's express inclusion of the enumerated class of beneficiaries in horizontal privity with the ultimate purchaser should "be given a strictly literal interpretation which excludes any other relationship no matter how closely akin, policy-wise."¹⁵⁸

Interpreting the language of Official Comment 3 to section 2-318, the court found the section was impartial "beyond" the enumerated class, and such neutrality was attributed to developing issues of vertical privity.¹⁵⁹ However, since the court found section 2-318 only addressed issues of horizontal privity, the court relied on Official Comment 2 to section 2-313 to find the correct judicial interpretation of section 2-318.¹⁶⁰ The text of Official Comment 2 to section 2-313 that addresses section 2-318 states:

The provisions of Section 2-318 on third party beneficiaries expressly recognizes this case law development *within one particular area*. Beyond that, the matter [of lack of privity] is left to *the case law with the intention that the policies of this Act may offer useful guidance in dealing with further cases as they arise*.¹⁶¹

The court reasoned the phrase "particular area" addressed by section 2-318 should be interpreted in regards to non-purchasing parties in horizontal relationships with the ultimate purchaser and their ability to recover against a seller's breach of warranty.¹⁶² Therefore, the court interpreted the Official Comment to section 2-313 to mean that the "policies" of section 2-318 should provide "useful guidance [for] further cases as they arise" in resolving issues of horizontal privity.¹⁶³ Based on this interpretation, the court concluded that the correct judicial approach to resolving issues of horizontal privity should be determined on a case-by-case basis, and policy supports that non-purchasing parties could be regarded as functional equivalents to those specifically enumerated in Alternative A.¹⁶⁴

Since it must be reasonable to expect non-purchasing parties to "use, consume or be affected by the goods" in order to gain third-party beneficiary standing, the court held the ultimate purchaser would want those who are expected to come in contact with the goods to have the same warranty pro-

157. *McNally*, 313 A.2d at 918.

158. *Id.*

159. *Id.* at 920.

160. *Id.*

161. *Id.* at 919-920 (quoting U.C.C. § 2-313 cmt. 2 (2001)) (emphasis in original).

162. *McNally*, 313 A.2d at 920.

163. *Id.* (citing § 2-313 cmt. 2).

164. *Id.* at 920.

tection a seller has given to him.¹⁶⁵ Therefore, the plaintiff, who was employed by the ultimate purchaser and required to work in close proximity with the skidder during the course of his employment, was held to be a beneficiary of the warranties given to his employer.¹⁶⁶ Thus, the employer would want the plaintiff to be a beneficiary of his seller's warranties regarding the fitness and safety of the chipper.¹⁶⁷ Further, the court gave a figurative interpretation to the word "family" to allow the plaintiff to fall within the enumerated class of Alternative A since employees are seen as members of the corporate "family."¹⁶⁸ Consequently, an ultimate purchaser's employee was a third-party beneficiary to a seller's warranty under section 2-318.¹⁶⁹

C. Carlson v. Armstrong World Industries, Inc.

In *Carlson v. Armstrong World Industries, Inc.*,¹⁷⁰ the plaintiff contracted pleural disease from exposure to and inhalation of asbestos fibers during the course of his employment as a painter.¹⁷¹ The plaintiff brought a breach of warranty action against defendants who mined, manufactured, and distributed asbestos-containing products.¹⁷² The defendants moved to dismiss for failure to state a claim upon which relief can be granted.¹⁷³

Section 672.318 of the *Florida Statutes* expressly extends warranty coverage to a purchaser's employee.¹⁷⁴ Since the plaintiff alleged that the defendants sold the product to either the plaintiff, his employer, or others who had knowledge that the plaintiff would be exposed to the product, the court found that the plaintiff was an intended beneficiary of the implied warranty of merchantability between the defendant and the plaintiff's employer.¹⁷⁵ "Therefore, defendant's motion to dismiss . . . [was] denied."¹⁷⁶

165. *Id.* at 921 (quoting § 2-318).

166. *Id.*

167. *McNally*, 313 A.2d at 921 (citing *Delta Oxygen Co. v. Scott*, 383 S.W.2d 885, 893 (Ark. 1964)).

168. *Id.* *Contra* *Halderman v. Sanderson Forklifts Co.*, 818 S.W.2d 270, 273 (Ky. Ct. App. 1991) (holding that the employer-employee relationship does not fall within the definition of "family" under Alternative A).

169. *McNally*, 313 A.2d at 923.

170. 693 F. Supp. 1073 (S.D. Fla. 1987).

171. *Id.* at 1075.

172. *Id.*

173. *Id.*

174. *Id.* at 1077.

175. *Carlson*, 693 F. Supp. at 1078.

176. *Id.* However, in *Favors v. Firestone Tire & Rubber Co.*, 309 So. 2d 69, 73 (Fla. 4th Dist. Ct. App. 1975), the Fourth District Court of Appeal held:

VII. CONCLUSION

Although the purpose of section 2-318 was “to make uniform the law among the various jurisdictions,”¹⁷⁷ the states have only achieved uniformity in deciding issues of vertical privity by allowing purchasers to sue any party involved in the chain of selling a product.¹⁷⁸ Consequently, there remains a divergence among Alternative A jurisdictions resolving issues of horizontal privity.¹⁷⁹ Jurisdictions are split in deciding whether third-party beneficiary standing should extend beyond the buyer’s family, household, or houseguests. This inconsistency is substantially attributed to the ambiguous language of Official Code Comment 3 to section 2-318. The commentary states that Alternative A gives beneficiary status to “the family, household and guests of the purchaser,”¹⁸⁰ but directly follows this phrase by stating the section is “neutral” beyond the category of third-party beneficiaries contemplated by the drafters and does not intend “to enlarge or restrict the developing case law”¹⁸¹ in regards to extending warranty protection to “other persons in the distributive chain.”¹⁸² However, the Code’s failure to provide a definition of the term “distributive chain” has left the term open for judicial interpretation.¹⁸³ Therefore, if a court interprets the “distributive chain” to refer only to issues of vertical privity, an employee will be barred from bringing a breach of warranty action since they were not a purchaser.¹⁸⁴ On the other hand, if a court interprets the “distributive chain” in relation to extending warranty protection horizontally, an employee is more likely to recover since the court is not “restricted” to only protect the enumerated class.¹⁸⁵ The Code’s use of such vague language presents each state’s judiciary with the opportunity to interpret its meaning differently.

An automobile parts store employee, who was injured when the wheel assembly of a truck owned by one of the defendants exploded during the mounting of a tire, was not considered a third-party beneficiary of the truck manufacturer’s implied warranty to that defendant, despite an allegation that the store was the defendant’s agent, where the store had simply been engaged to change the truck’s tires, where there was no agency relationship between the defendant and the store, and where there was no direct employment relationship between the defendant and the injured employee.

41A FLA. JUR. 2D *Products Liability* § 51 (2004) (citing *Favors*, 309 So. 2d at 73).

177. 1 HAWKLAND, *supra* note 5, at § 2-318:1.

178. See *Groppel Co. v. United States Gypsum Co.*, 616 S.W.2d 49 (Mo. Ct. App. 1981).

179. 1 HAWKLAND, *supra* note 5, at § 2-318:1.

180. U.C.C. § 2-318 cmt. 3 (2001).

181. *Id.*

182. *Id.*

183. § 2-103.

184. See *Teel v. Am. Steel Foundries*, 529 F. Supp. 337 (E.D. Mo. 1981).

185. See *McNally v. Nicholson Mfg. Co.*, 313 A.2d 913 (Me. 1973).

Although the issue of extending warranty coverage could be decided either way, the fact that the Code failed to provide a definition for "distributive chain" and used the phrase in a section attempting to resolve privity issues seems to support the section's neutrality concerning both vertical and horizontal privity. The drafters' express inclusion of the buyer's family, household, and houseguests as beneficiaries only proves their disposition toward extending warranty protection to this enumerated class. The phrase "beyond this, the section in this form is neutral,"¹⁸⁶ should be construed to mean the section is impartial regarding whether other non-purchasers should have standing to sue on warranty claims.

Jurisdictions that view the category of third-party beneficiaries contemplated by the drafters as an exhaustive list of beneficiaries are contradicted by the language of the commentary. Regardless of whether "distributive chain" refers to issues of vertical or horizontal privity, the text of Official Comment 3 says the section is neutral beyond giving the enumerated class warranty coverage, and the section is not a restraint on developing case law regarding "whether the seller's warranties . . . extend to other persons in the distributive chain."¹⁸⁷ Therefore, the drafters recognized new privity issues may arise in a state's judiciary after its legislature enacted Alternative A. Thus, the drafters left future privity issues for the courts' determination on a case-by-case basis.¹⁸⁸ Therefore, jurisdictions denying employees standing as third-party beneficiaries because they are not among the enumerated class seem to be using flawed reasoning. These jurisdictions rely heavily on their legislative intent for adopting Alternative A. However, in adopting this alternative, the legislature is accepting the exact language of the entire alternative, including the commentary. By enacting Alternative A verbatim, it appears a state's legislature is also impartial as to whether warranty coverage should extend beyond the purchaser's family, household, and houseguests and intends for the courts to resolve this issue.

Further, denying warranty coverage to a purchaser's employees because they are protected under the worker's compensation laws is questionable public policy. If an employee who is injured during the course of his or her employment by a defective product purchased by their employer can only recover under a worker's compensation statute, they may be denied recovery for emotional distress or pain and suffering.¹⁸⁹ Therefore, if the employer who purchased the product was injured, they could recover far more against

186. § 2-318 cmt. 3.

187. *Id.*

188. *Id.*

189. See *Durniak v. August Winter & Sons, Inc.*, 610 A.2d 1277, 1279 (Conn. 1992) (citing *Skitromo v. Meriden Yellow Cab Co.*, 528 A.2d 826, 827 (Conn. 1987)).

a seller for their injuries than an employee who is injured by the same defective product and covered under worker's compensation.

In order to resolve the issue of whether employees should be third-party beneficiaries to a seller's warranties, a state's legislature should follow the Florida Legislature's lead and amend its version of Alternative A. By doing so, the legislature will take the issue of extending warranty coverage to a purchaser's employees out of the judiciary's hands, and the amendment will create uniformity since the issue will no longer be decided on a case-by-case basis. The statute could be amended to include employees without any changes to the commentary, thus leaving remaining issues of privity for the court's determination. Further, legislatures of jurisdictions that only intend to give third-party beneficiary standing to the purchaser's family, household, or houseguests can also resolve this issue by amending the statute to include language stating the enumerated list is exhaustive. Although jurisdictions may argue that a legislature's adoption of Alternative A instead of Alternatives B or C proves that the legislature only intended warranty protection for the enumerated class, giving such a narrow interpretation categorizes all other non-purchasing parties together and collectively denies them the right to bring a breach of warranty action.

An employee, like a non-purchasing plaintiff who is in the family or home of the purchaser, is a "natural person" who reasonably can be expected to "use, consume or be affected by the goods."¹⁹⁰ For that reason, employees should be viewed as functional equivalents to the enumerated class of Alternative A.¹⁹¹ Manufacturers, distributors, and retailers expect a purchaser's employee to use a product purchased by their employer for use during the course of their employment. Basically, "[a] corporation cannot use the . . . [product] at all unless its employees operate it."¹⁹² Therefore, jurisdictions denying standing to all parties not expressly mentioned within the section group employees with bystanders, who do not use the goods, and lessees, who may not be contemplated at all by the seller.

In conclusion, the ambiguities of Official Comment 3 have allowed the courts to reach different conclusions in deciding issues of privity. However, it seems logical to construe the ambiguous language in relation to both vertical and horizontal privity. In order to resolve the discrepancy among jurisdictions, a state's legislature should take action by amending its state's statutory version of Alternative A to include employees within the class of protected beneficiaries. As it stands, leaving issues of privity for the courts to

190. § 2-318, Alternative A.

191. *McNally*, 313 A.2d at 920.

192. *Whitaker v. Lian Feng Mach. Co.*, 509 N.E.2d 591, 595 (Ill. App. Ct. 1987).

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decide on a case by case basis will deny employees their right to recover for injuries sustained from a defective product.

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